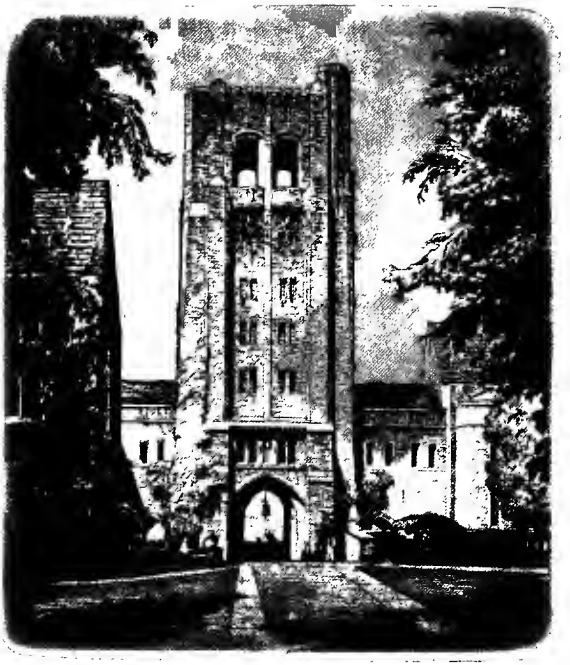

ACCIDENTAL MEANS

A BRIEF
ON THE INSURING CLAUSE OF PERSONAL ACCIDENT POLICIES

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PREFACE

This brief was originally prepared to be used as a working tool by its author and his associates. The first edition, which was printed in 1913, was a limited one and was not placed on sale. Complimentary copies were sent to a few accident companies. During the past three years many requests for the brief have been received. In an attempt to comply with these requests the first edition was soon exhausted. It has been assumed that the fact that these requests have continued to multiply indicates that the brief is of some value not only to the law and claim departments of the various accident companies, but also to those lawyers who have occasion to specialize in that branch of insurance law with which the brief deals. Since the first edition was printed about seventy decisions, involving questions which are discussed in the brief, have been handed down by the courts. A discussion of these new decisions is included in this edition.

In the preparation of the brief the author has confined himself to a consideration of the reported cases only in so far as they bear upon the construction and interpretation of the insuring clause of an accident policy. The many exceptions to the insuring clause, such as those pertaining to voluntary exposure, intoxication, violating the law, etc., have not been considered. Practically all of the cases cited discuss propositions of accident insurance law other than those included in this brief and in many of them the questions here involved are only incidentally considered All questions other than those pertaining to the interpretation of the insuring clause have been ignored.

The author, in common with other insurance lawyers, has long realized that there is no work on accident insurance which deals exhaustively with the questions arising in connection with the determination of the precise liability of accident companies under the insuring clause of their policies. Practically

all of the reported decisions in the United States bearing upon these questions have been discussed and classified in this brief. The attached table of cases, arranged alphabetically, indicates the page or pages of the brief on which each case has been cited or discussed. If it is desired to determine the particular holding of any case, in so far as the construction of the insuring clause is concerned, it is only necessary to refer to the table of cases.

Death is brought about in an infinite number of ways. The insuring clause of an accident policy attempts in a few lines to limit liability to a fraction of that infinite number. It is, therefore, absolutely indispensable that this insuring clause be drawn without ambiguity. It is further essential, in deciding the multitude of border line cases, to first determine definitely the real meaning of the insuring clause and the general principles by which its interpretation must be governed, and then to reason very closely in order to correctly apply these principles.

Accident policies have, from the very nature of things, been drawn in many different ways. For this reason and because of the limited character of the hazard insured against and the difficulty of stating that hazard in general terms, it is not surprising that there is much confusion and misunderstanding as to the law.

The business of accident insurance is of comparatively recent origin and the litigation of today is making the law by which the companies are to be governed, perhaps, for centuries. It is therefore very desirable from the standpoint of the companies, that the principles of law by which they are to be governed be fixed by the reported decisions uniformly and definitely.

If this brief shall assist in any measure in bringing about this end, the author will feel that he has been more than repaid for the labor entailed by its preparation.

M. P. C.

Chicago, November 15, 1916.

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A Brief on the Insuring Clause of Personal Accident Policies

CHAPTER I.

The Origin and Evolution of the Insuring Clause.

An "accident" is defined by Webster as "an event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event; chance; contingency." This definition has been repeatedly quoted by the courts who have in some instances added to and embellished it. It would answer no good purpose to call attention to the great number of immaterial variations and additions to Webster's definition which they have made. Suffice it to say that in practically all cases the courts seem to have relied upon this definition as a basis and to have in reality added nothing to it.

The first personal accident policies were issued in the United States in 1864. The company which wrote them followed the example of an English company which had been issuing these policies for some years.

One of the earliest cases in the United States construing the insuring clause of a policy of this character is *Schneider* v. *Provident Life Ins. Co.*, 24 Wis., 28, decided by the Supreme Court of Wisconsin in 1869. It appears from the opinion that the policy insured "against personal injury arising from accident and causing death." This insuring clause was very similar to that contained in a policy issued by the Railway Passenger Assurance Corporation on the 6th of September, 1856, and construed in *Trew* v. *Railway Pass. Assur. Co.*, England, 1861, 6 H. & N., 838, which provided to pay death indemnity if the insured should die from the effects of "any injury caused by accident or violence," with a further proviso that there should be no liability unless the injury was "caused by some outward and visible means."

In the case of *Martin* v. *Travelers Ins. Co.*, England, 1859, 1 F. & F., 505, it appears from the opinion that the court had before it a policy in which the insuring clause was nearly

identical with that just quoted. It insured "against any bodily injury arising from any accident or violence 'provided that the injury should be occasioned by any external or material cause operating on the person of the insured.' "

The draftsmen of the first policies of accident insurance naturally did not fully appreciate the complexity and infinite variety of the hazard they proposed to insure against and did not realize what an exceedingly comprehensive liability they assumed. See for instance the case of *North American Life & Acc. Ins. Co.* v. *Burroughs,* decided by the Supreme Court of Pennsylvania in 1871, 69 Pa. State, 43, where the policy agreed to pay death indemnity "in case of death resulting * * * in consequence of accident."

In the case of *Martin* v. *Travelers, supra,* it appeared that the insured had voluntarily lifted a heavy burden and strained his back. The court held that the company was liable. Because of these and other similar experiences the companies soon found it necessary to change the insuring clause. They began to appreciate that the clause as originally drawn was somewhat ambiguous and that there was grave danger that the courts would hold that they were in reality insuring against all fortuitous and unexpected bodily injuries, defects, or lesions, external or internal, and many of the infinite number of morbid changes brought about by disease or abnormal conditions. In one sense practically all of them are accidents and fall within the definition given by Webster and repeatedly quoted by the courts.

Some of the companies early recognized the necessity of stipulating that the means or manner in which the injury is brought about must be of an external and violent character. We have already shown that in the *Trew* case, 1861, the policy provided that the injury must be "caused by some outward and visible means;" in the *Martin* case, 1859, that the injury must be occasioned by "external or material cause operating on the person." It is interesting to note, however, that not all of the companies even considered it necessary to insert this qualification since in the *Burroughs* case, 1871, the policy provided to pay "in case of death resulting * * * in consequence of accident."

The companies soon found that it was also necessary, if they wished to avoid liability for an unexpected and unforeseen injury brought about by the voluntary act of the insured, done in the way that he intended to do it, still further

to modify the insuring clause. Under the policies construed in the cases above referred to it was at least doubtful whether there was liability for death resulting from the accidental result of an intentional act done in the way intended.

If a man voluntarily attempts to lift a weight and without slipping or falling but simply because of the voluntary exertion, receives an injury, such as a strain, a rupture or a burst artery, such injury is evidently accidental since it is unforeseen, unfortunate and undesigned. It is also produced by external and violent means under the holding of the court in the *Martin* case and in many later cases. In such a case, however, the means bringing about the accidental result are not accidental. In other words, the insured does something which he intends, in a way that he intends, and the only thing unexpected, fortuitous and undesigned, is the result.

The companies therefore, to protect themselves against unexpected and accidental results from voluntary acts done as intended, inserted a further qualification in the insuring clause, to-wit, that the "means" must not only be external and violent, but also accidental; that is to say, that the means producing the result, as well as that result, must be accidental.

It is difficult definitely to ascertain whether the use of the phrase "accidental means" first came about in England or America. In any event we find that in the case of *Southard* v. *Railway Pass. Assur. Co.,* 34 Conn., 574, decided in 1868, nearly ten years after the decision of the *Trew* and *Martin* cases, the court had before it a policy which provided to pay death indemnity upon proof "that the insured * * * shall have sustained bodily injuries, effected through violent and accidental means," with a further provision excluding liability for "any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract." In the case of *Ripley* v. *Railway Pass. Assur. Co.,* Fed. Case No. 11,854, decided by the U. S. Circuit Court in 1870, and affirmed by the U. S. Supreme Court in 1872, 16 Wal., 336, the policy insured against death resulting from "bodily injuries, effected from violent and accidental means."

A good illustration of the clause used by the English companies after this modification appears in *Winspear* v. *Acc. Ins. Co.,* 6 L. R. Q. B. Div., 42, decided in 1880, where the policy insured against the effects of "personal injury caused

by accidental, external and visible means," and provided that it would not extend to injuries "caused by or arising from natural disease or weakness or exhaustion consequent upon disease, * * * or to any death arising from disease although such death may have been accelerated by accident."

As examples of the modern insuring clause, see

Fidelity & Cas Co. v. *Stacey's Exs.,* U. S. Cir. Ct. Apps., 1906, 143 Fed., 271:

The insurance was against death "resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means."

Driskell v. *U. S. H. & A.,* 1906, 117 Mo. App., 362; 93 S. W., 880:

The insurance was against death resulting "solely" from "bodily injuries caused solely and exclusively by external, violent and accidental means."

Lehman v. *Gt. Western Acc. Assn.,* 1911, 153 Ia., 118; 133 N. W., 752:

The insurance was "against the effects of personal bodily injury caused solely by external, violent and accidental means."

Hastings v. *Travelers Ins. Co.,* U. S. Cir. Ct., 1911, 190 Fed., 258:

The insurance was "against bodily injuries, effected directly and independently of all other causes through external, violent and accidental means."

Crandall v. *Continental Casualty Company,* App. Ct. Ill., 1913, 179 Ill. App., 330.

The company agreed to pay death indemnity if the insured should receive bodily injury "effected directly and independently of all other causes through external, violent and purely accidental means resulting in the death of insured necessarily and solely from such injury."

Of course there is no peculiar efficacy or magic about the words "accidental means." The same idea may be conveyed by other phraseology. In fact it was conveyed, although perhaps not as clearly as it might have been, by the insuring clause of some of the very early policies, drawn before the accidental means phrase came into common use. See for in-

stance the case of *Trew* v. *Railway Pass. Assur. Co.,* already referred to, where the policy provided to pay death benefits if insured should die from the effect of "any *injury* caused by accident." This is really only another, though less explicit way of saying "an *injury* effected through accidental means," and is clearly distinguishable from a policy insuring against "*death* from accident," or "*death* from an accidental cause."

As illustrative of a modified insuring clause conveying the same meaning as is expressed by the phrase "accidental means," see the case of

Continental Cas. Co. v. *Peltier,* 1905, 104 Va., 222; 51 S. E., 209,

where the policy provided to pay indemnity for loss resulting from injuries "effected * * * through * * * purely accidental causes." One of the leading accident companies is now using in some of its policies an insuring clause providing to pay indemnity for loss resulting from *bodily injury* "which is effected solely and independently of all other causes by the happening of an external, violent and purely accidental event."

From the foregoing it appears that there is no liability under the usual insuring clause of a modern accident policy until the claimant has established

(1) *That the insured has received an injury effected through external, violent and accidental means.*
(2) *That an injury so effected has been the sole cause of death or disability.*

A discussion of the insuring clause, therefore, resolves itself naturally into two divisions. We propose to discuss first the cases pertinent in connection with the determination of when an injury may be considered as having been effected through external, violent and accidental means. Inasmuch as there are a comparatively small number of reported decisions considering the meaning to be given to the adjectives "external" and "violent," and as the questions arising in regard to their proper construction are less involved than those presented in a consideration of the remaining adjective "accidental," we shall, in our discussion, reverse the order in which these adjectives usually appear in the insuring clause, considering the last first.

We shall reserve for a later portion of this brief the con-

sideration of when and under what circumstances an injury may be regarded as the sole cause of death or disability. In that connection we shall also discuss the wording of the insuring clause as it has been construed by the courts, in particular reference to the various ways in which the companies have sought to express the idea that the injury must be the sole cause of death independent of every other cause. In their attempt to convey that idea, they have made use of many qualifying phrases and adjectives and have provided that the injuries must be "the sole cause of death;" must cause death "independent of any other cause;" must be the "sole and exclusive" cause of death, etc. They have also in many cases, either directly following the insuring clause or in some other part of the policy, inserted a proviso that there shall be no liability where death is "caused wholly or in part by bodily infirmities or disease"; where death is occasioned "directly or indirectly in consequence of any disease," etc. The meaning and effect of these qualifying words and phrases will be discussed later.

It may be noted in passing, however, that the companies have frequently used the same, or similar qualifying words and phrases in connection with what we have heretofore referred to as the first branch of the insuring clause, and by their use have also endeavored to make it clear that there is to be no liability where the *injury,* as distinguished from the *death* or *disability,* is brought about "wholly or in part," "directly or indirectly," etc., by disease or bodily infirmity. The use of these words and phrases indiscriminately in connection with both branches of the insuring clause has given rise to much confusion and misunderstanding.

Again the double nature of the correct insuring clause has in some instances entirely escaped the attorneys who have drawn the policies for the companies. In some cases they have totally disregarded it and, instead of providing that the *injuries* must be received through accidental means and must be the sole cause of *death,* they have simply stated that the company will pay indemnity for *death,* as distinguished from *injury,* "effected by accidental means." Under these circumstances it is not at all strange that there has been a great deal of blind and aimless floundering about in the maze of conflicting, ill-considered, and in some cases almost unintelligible terminology which some companies have used in drawing their contracts.

Proceeding with the first branch of this subject, we again call attention to the elementary proposition that an accidental injury is not necessarily effected through accidental means. Before there can be liability for the results of an injury, it must be shown not only that such injury was accidental in the sense that it was unforeseen, unfortunate and not brought about by design, but that the "*means*" by which it was effected were also accidental. There must be an accident brought about by an accident. The vital distinction is between the means and the result. Both must be accidental.

For example, a man is swinging an Indian club in a way which he intends. As a consequence he sprains a muscle or ruptures an artery. He has done nothing which he did not expect to do and has done what he expected to do in the precise manner intended. The result of course is undesigned and fortuitous. That result is unquestionably accidental. At the same time it is clearly not effected through accidental means. If we inject into the hypothetical case just suggested the further hypothesis that the club strikes a chandelier or some other object, and, as a consequence, the unexpected and undesigned sprain or rupture occurs, then we have the necessary element of accidental means bringing about an accidental result and the company is liable, if the resultant injury is the sole cause of death or disability.

The failure to keep clearly in mind the fundamental proposition that there must be an accidental means as well as an accidental result is largely responsible for many conflicting decisions and much uncertainty and misunderstanding as to the law. It must be admitted that this misunderstanding is still very prevalent not only on the part of the courts and the bar generally, but even on the part of some attorneys who have represented the companies in the courts.

The question has been further obscured and muddled by ill-considered and broad general statements which the courts have made, even in decisions where they have arrived at a correct conclusion. These statements, entirely ignoring the distinction between accidental means and accidental result, when taken by themselves and apart from the facts of the particular case, are very misleading and have often confused the courts who have been called upon to decide subsequent cases, similar in nature, but properly distinguishable on this vital point.

CHAPTER II.

Classification and Discussion of Authorities on "Accidental Means."

Among the infinite number of casualties for which claim is made against accident companies, many cases arise which are very difficult to decide correctly. These problems can best be elucidated in connection with the cases in which they have arisen.

We have, therefore, divided and classified the reported cases into groups, bringing together those authorities which by reason of the facts involved and the decisions of the courts upon those facts may naturally and logically be considered as enunciating the same legal conclusions.

Proposition No. 1.

There can be no recovery under a policy insuring against the result of an injury effected through accidental means, where such injury, although totally unexpected, fortuitous and undesigned, and in that sense accidental, is occasioned by a voluntary act on the part of the insured, executed in an expected and ordinary way, since such injury, though accidental, is not effected through accidental means.

Southard v. *Railway Pass. Assur. Co.*, 1868, 34 Conn., 574. Hernia from jumping off of car and running without stumbling or falling.

McCarthy v. *Travelers Ins. Co.*, 1878, 8 Bissell, 362, Federal Case No. 8682. Rupture of blood vessel while exercising with Indian clubs.

Westmoreland v. *Pref. Acc. Ins. Co.*, 1896, 75 Federal, 244. Death occasioned by voluntary administration of chloroform in the usual way.

Travelers Ins. Co. v. *Selden*, 1897, 78 Federal, 285. Injury received by running rapidly over rough ground without stumbling or falling.

Shanberg v. *Fid. & Cas. Company*, 1905, 158 Fed., 1; affirming 143 Fed., 651. Injury from carrying one end of heavy door without slipping, stumbling or falling.

Hastings v. *Travelers Ins. Co.*, 1911, 190 Federal, 258. Dilation of heart produced by insured voluntarily raising himself up and down in chair by placing hands on arms of chair.

Preferred Acc. Ins. Co. v. *Patterson,* 1914, 213 Fed., 595. Death from injury to kidneys occasioned by slipping while cranking automobile. Under evidence held case for jury, but the court states that if insured had not slipped and only did what he intended, the resultant injury would not be considered as effected by accidental means.

Stokely v. *Fid. & Cas. Co.,* 1915, 193 Ala., 90; 69 So., 64. Insured coughed, bursting stitches of wound occasioned by a previous operation for appendicitis.

Rock v. *Travelers Ins. Co.,* 1916, Cal.; 156 Pac., 1029. Death occasioned by heart dilation due to unusual but intentional exertion.

Cobb v. *Pref. Mut. Acc. Assn.,* 1895, 96 Ga., 818; 22 S. E., 976. Blindness, presumably occasioned by walking with heavy grips on hot day, without slipping or falling.

Moore v. *Ill. Com. Men's Assn.,* 1911, 166 Ill. App., 38. Burden on plaintiff to show injury effected through accidental means.

Schmid v. *Ind. Trav. Acc. Assn.,* 1908, 42 Ind. App., 483; 85 N. E., 1032. Paralysis of heart caused by high altitude and unusual strain occasioned by muscular exertion in carrying grip upstairs in rarified atmosphere. Result of voluntary physical exertion or vicissitudes of climate or atmosphere, although unexpected and unforeseen, not due to accidental means.

Carnes v. *Iowa Trav. Men's Assn.,* 1898, 106 Ia., 281; 76 N. W., 683. Death from intentionally taking morphine tablets, if insured intends to take amount he does take and misjudges effects, although totally unexpected and unforeseen, not due to an "accidental cause."

Feder et al. v. *Ia. State Trav. Men's Assn.,* 1899, 107 Ia., 538; 78 N. W., 252. Death from rupture of artery from attempt to close window shutters; no evidence that insured fell, slipped, lost balance, failed to catch shutter, etc., or that anything occurred which was not foreseen and planned except the rupture; not due to an "accidental cause."

Smouse v. *Iowa State Trav. Men's Assn.,* 1902, 118 Ia., 436; 92 N. W., 53. Death from rupture of blood vessel by a voluntary attempt to remove night shirt over head, not due to an "accidental cause."

Lehman v. *Great Western Acc. Assn.,* 1911, 153 Ia., 118; 133 N. W., 752. Appendicitis occasioned from strain while bowling without slipping or falling.

Lickleider v. *Iowa State Trav. Men's Ass'n.,* 1915, Iowa; 151 N. W., 479. Death from blood clot occasioned by exertion in removing automobile tire in the manner intended.

Riley v. *Interstate Business Men's Acc. Assn.,* 1915, Iowa; 152 N. W., 617. Insured intending to take medicine took poison by mistake. Court intimates company liable, but says would be no liability if insured knew what he was taking but misjudged the result.

Smith v. *Travelers Ins. Co.,* 1914, 219 Mass., 147; 106 N. E., 607. Death from meningitis occasioned by vountarily sniffing medicine into nose, which, by reason of peculiar construction of bones of head, carried certain germs into brain.

Pervanger v. *Union Cas. & Surety Co.,* 1904, 85 Miss., 31; 37 Sou., 461. Court intimates in passing on demurrer that injury from voluntary lifting and straining not due to accidental means, but *contra* if weight fell and struck insured.

Appel v. *Ætna Life Ins. Co.,* 1903, 83 N. Y. Sup., 238; affirmed 180 N. Y., 514. Appendicitis from riding bicycle over rough ground without fall or collision.

Niskern v. *Uni. Bro. of C. & J. of America,* 1904, 87 N. Y. Sup., 640. Disability caused by rupture of blood vessel from voluntary lifting not occasioned by "accidental injuries."

New Amsterdam Cas. Co. v. *Johnson,* 1914, 91 Ohio, 155; 110 N. E. 475. Heart dilation occasioned by voluntarily plunging into cold bath after violent exertion.

Stone v. *Fid. & Cas. Co.,* 1916, 133 Tenn., 672; 182 S. W., 252. Loss of sight occasioned by sudden but intentional exertion causing blood clot.

Clidero v. *Scottish Acc. Ins. Co.,* England, 1892, 29 Scottish Law Reporter, 303. Insured pulling on

stocking felt something give way. Autopsy disclosed colon had fallen out of place, causing death. No evidence of slip or other accidental means.

Scarr v. *General Acc. Assur. Corp.*, England, 1905, 1 Kings Bench, 387. Exertion in ejecting drunken man from premises.

See also the Sunstroke cases, under Proposition No. 12.

Proposition No. 2.

Where an accident policy provides to pay indemnity in case of death resulting "in consequence of accident," or words to that effect, and does not limit liability to death which is the result of *injuries effected through accidental means,* and the insured dies as the result of an unexpected and undesigned injury brought about by voluntary exertion, the company is liable.

North American Life & Acc. Ins. Co. v. *Burroughs*, 1871, 69 Pa. State, 43.

The evidence in this case showed that the insured, in perfect health, was pitching hay and the fork handle slipped through his hand and struck him on the stomach, producing injury which caused death. Under the evidence, therefore, death resulted from an injury effected through accidental means. In the proofs filed by the beneficiary, however, no mention was made of the fact that the fork handle slipped and struck the insured, and it was merely alleged that the injury resulted from a strain. The defendant contended that there was a variance between the evidence and the proofs of death filed by the beneficiary. The Supreme Court of Pennsylvania very properly concluded that under the insuring clause it made no difference whether the injury was caused by a strain from voluntary exertion or by a blow from the accidental slipping of the fork handle, since, in either contingency, it is clear that the death resulted "in consequence of accident."

This case has been repeatedly cited by the courts in later decisions construing policies essentially different from that held by Burroughs in the fact that, instead of insuring against death resulting "in consequence of accident," they insured against death resulting "from injury effected through accidental means." In many of these later cases the courts have entirely overlooked this distinction and have relied upon the *Burroughs* case as authority for holding the company liable

where the death was brought about by an accidental injury effected by voluntary exertion, that is to say, by an act done in an expected and usual way without any element of accident in the means bringing about the accidental result.

Proposition No. 3.

A result such as follows from ordinary means voluntarily employed in a not unusual or unexpected way cannot be called a result effected by accidental means, but if in the act which precedes the injury something unforeseen, unexpected and unusual occurs which produces the injury, then the injury is effected by accidental means. If the insured does something which he intends to do but involuntarily does that thing in a way different than he intended and because of some involuntary movement of the body an injury results, such injury is effected by accidental means.

> *U. S. Mut. Acc. Assn.* v. *Barry,* 1889, 131 U. S., 100, affirming 23 Fed., 712. Insured voluntarily jumped from platform following two companions who jumped without injury. Evidence showed he came down heavily on his heels and not on his toes, as would naturally be expected, producing stricture of the duodenum. Held for jury under proper instruction to determine whether there was an involuntary twist, turn or wrench of body in jumping.

Under a few authorities it seems that where the thing which the insured attempts to do is of such a character as would not ordinarily be expected to bring about an injury, and where, from all of the surrounding circumstances, it is apparent that, in doing said thing, the insured probably involuntarily turned or twisted his body or got into an unexpected position, even where there is no direct evidence upon which to base such a conclusion, it is for the jury to determine, as a question of fact, whether or not the insured involuntarily turned or twisted his body in an unusual and unexpected way.

> *Rodney* v. *Travelers Ins. Co.,* 1886, 3 N. Mex., 316; 9 Pac. Rep., 348.
>
> *Standard Life & Acc. Ins. Co.* v. *Schmaltz,* 1889, 66 Ark., 588; 53 S. W., 49.
>
> *Atlanta Acc. Assn.* v. *Alexander,* 1898, 104 Ga., 709; 30 S. E. 939.

Horsfall v. *Pac. Mut. Life Ins. Co.,* 1903, 32 Wash., 132; 72 Pac., 1028.
Ludwig v. *Pref. Acc. Ins. Co.,* 1911, 113 Minn., 510; 130 N. W., 5.

In the *Rodney* case it appears that the insured ruptured his ear drum while diving, which injury would of course be accidental, although not brought about by accidental means unless there was some involuntary slip, turn or twist. There was no evidence of such means. The court said that under the circumstances the jury was justified in finding that there was a slight accidental turn of the body.

In the *Schmaltz* case the insured, in perfect health, removed a cylinder head weighing 80 pounds, with a steel bar, dropping the bar as the cylinder head came off and, while in stooping position, grasping same to prevent it falling. As a result he ruptured a blood vessel in his stomach. The court (following the *Barry* case) laid down correct propositions of law, without referring to the fact that there was evidence in that case that the insured alighted on his heels in an unexpected manner, and approved the trial court's action in allowing the case to go to the jury.

In the *Alexander* case, the insured, a blacksmith, in perfect health, struck a slanting blow with a heavy sledge hammer and felt severe pain, which proved to have been caused by hernia. The court relied on the *Barry* case but does not appear to have recognized the distinction between an accidental result and accidental means pointed out in that case. It also relied upon the case of *North American Life & Acc. Ins. Co.* v. *Burroughs,* 1871, 69 Pa. State, 43, to support the conclusion that an accidental death, and death from injury effected by accidental means, amount to the same thing, apparently without understanding that the policy construed in the *Burroughs* case did not contain the accidental means clause and insured broadly against death "resulting * * * in consequence of accident." The opinion therefore contains some misleading and incorrect statements.

In the *Horsfall* case, the insured, a blacksmith, apparently in perfect health and very strong, lifted one end of a bar weighing about 400 pounds. In doing so he was compelled to stand on top of a pile of iron and reach below his feet. After lifting the bar and helping to carry it a short distance, his heart became dilated, causing death. The Supreme Court of Washington, as did the Supreme Court of Georgia in the

Alexander case, relied upon the *Barry* and *Burroughs* cases in support of its conclusion that death by accident "is death from an unanticipated event which happens as by chance, or does not take place according to the usual course of things." The conclusion that the death was accidental was clearly correct. The court, however, entirely overlooked the distinction between accidental death and death from injuries caused by accidental means, pointed out in the *Barry* case, and seems also to have been oblivious of the difference between the insuring clause before it for construction and that before the Pennsylvania court in the *Burroughs* case. The *Horsfall* case has been frequently cited in support of the palpably erroneous conclusion that there is no difference between an accidental death and a death resulting from injuries effected through accidental means. It has, however, been recently distinguished by the United States Circuit Court for the District of Washington in the case of *Hastings* v. *Travelers Ins. Co.,* 1911, 190 Fed., 258.

In the *Ludwig* case the insured, while playing baseball, attempted to steal second and slid head foremost, stopping with his stomach over and above second base, which consisted of a cement block, and thereby injuring himself. The Minnesota court relied upon the *Barry* case and seems to have realized the real effect of that decision, quoting from it to the effect that a result, though unexpected, is not an accident, if it was caused by means voluntarily employed, but held that there was evidence sufficient to justify the jury in finding for the plaintiff. The trial court, however, instructed the jury that if the injury was unforeseen and unexpected and not brought about designedly, it would be considered as due to accidental means. This instruction was flagrantly erroneous and the Supreme Court conceded that it was not strictly accurate but, for reasons best known to itself, held that the error was not sufficient to reverse.

The conclusion reached in these cases may perhaps be justified on the theory that there was some circumstantial evidence indicating an accidental turn or twist or involuntary movement in the act preceding and bringing about the accidental result, which was sufficient to take the case to the jury.

Proposition No. 4.

Where there is evidence that in the act which precedes and brings about an injury causing death, something undesigned

and fortuitous occurs, that is to say where there is evidence of an element of accident in the means bringing about the injury, the verdict of a jury holding the company liable will not be disturbed on appeal.

Preferred Acc. Ins. Co. v. *Patterson,* 1914, 213 Fed., 595. Death from injury occasioned by slipping while cranking automobile.

Pac. Mut. Life Ins. Co. v. *Shields,* Ala., 1913, 62 Sou., 71. Insured fell and struck head on brick.

Fid. & Cas. Co. v. *Meyer,* Ark., 1912, 152 S. W., 995. Insured fell and struck back on wagon seat.

Railway Offs. & Emps. Acc. Assn. v. *Coady,* 1889, 80 Ill. App., 563. Insured while running, stumbled and fell.

Smith v. *Ætna Life Ins. Co.,* 1901, 115 Ia., 217; 88 N. W., 368. Insured tried to get off moving train in dark, stood on lower step, acted as if he thought another step below, fell and was killed.

Continental Casualty Co. v. *Semple,* Ky., 1908, 112 S. W., 1122. Insured riding spirited and unruly horse which gave him "a terrible knock."

General Acc., Fire & Life Assur. Corp. v. *Meredith,* 1910, 141 Ky., 92; 132 S. W., 191. Insured running, failed to notice step and received severe jolt.

Maryland Casualty Co. v. *Burns,* 1912, 149 Ky., 550; 149 S. W., 867. Insured fell from counter to floor three feet below.

Travelers Ins. Co. v. *Davies,* Ky., 1913, 153 S. W., 956. Insured received unexpected wrench or blow.

Richards v. *Travelers Ins. Co.,* 1904, 18 S. D., 287; 100 N. W., 428. Insured tried to step from the top of one car to another and fell.

Gordon v. *U. S. Cas. Co.,* Tenn., 1899, 54 S. W., 98. Insured's arm was broken by sudden jerk of car which he was attempting to board.

International Travs. Assn. v. *Bosworth,* 1913, Texas; 156 S. W., 346. Insured struck by missile thrown by unknown person.

International Travs. Assn. v. *Rogers,* 1914, Texas; 163 S. W. 421. Piece of dirt blew in insured's eye.

Potter v. *Ætna Life Ins. Co.,* Wash., 1912, 128 Pac., 647. Insured accidentally inhaled certain poisonous gases.

The following cases are sometimes cited as contrary to what we have heretofore laid down as the correct rule:

Nax. v. *Travelers Ins. Co.*, 1904, 130 Fed., 985, reversed, 142 Fed., 653.

McGlinchey v. *Fid. & Cas. Co.*, 1888, 80 Me., 251; 14 Atl., 13.

Dent v. *Ry. Mail Assn.*, 1910, 183 Fed., 840, affirmed, 1914, 213 Fed., 981.

Bailey v. *Interstate Cas. Co.*, 1896, 40 N. Y. Sup., 513; affirmed without opinion 158 N. Y., 723; 53 N. E., 1123.

Prudential Cas. Co. v. *Curry*, 1914, 10 Ala. Apps., 642; 65 Southern, 852.

Maloney v. *Maryland Cas. Co.*, 1914, 113 Ark., 174; 167 S. W., 845.

Pack v. *Prudential Cas. Co.*, 1916, 170 Ct. Apps. Ky., 47; 185 S. W., 496.

International Travs. Assn. v. *Branum*, 1914, Texas; 169 S. W., 389.

The decision of the lower court in the *Nax* case is misleading. The death of the insured was caused by septicaemia following a self inflicted knife cut, made by the insured while trimming a corn. There is nothing to indicate that the knife slipped, or that there was any accidental means, and the court appears to hold by implication that under such circumstances the company would be liable. This is cleared up, however, by the decision of the Court of Appeals where it appears that the knife "slipped."

In the *McGlinchey* case it appeared that the insured was driving a horse which became frightened and ran away. He finally controlled the horse but immediately experienced pain, and died in an hour, either from fright or from some injury produced by his violent exertion in controlling the horse. The court very briefly disposed of the contention, apparently made by the defendant, that the death was occasioned by fright and hence was not due to an injury effected through accidental means, by saying that this "was a plain accident causing death;" that under the evidence it believed death was produced by a ruptured blood vessel near the heart, caused by extraordinary physical and mental exertion, but that even if the death was due to fright, the company was liable. The reasoning of the court is not particularly enlightening and is a little

misleading. The conclusion that the case was for the jury seems to be correct. The runaway was clearly unforeseen and undesigned. The evidence also probably justified a finding of some involuntary and unpremeditated movement on the part of the insured. Under these circumstances, there was certainly some evidence of accidental means. There was also evidence indicating that, as a result of such accidental means, the insured suffered some sort of a bodily injury which was the cause of death.

In the *Dent* case the insured came to his death from poisoning, following an apparently involuntary contact with poison ivy. The contract was in the usual form, and the conclusion of the court was probably correct. The evidence certainly justified a finding that the insured involuntarily and accidentally came in contact with the poison ivy and that, as the result of such accidental means, he suffered a fortuitous, that is to say, an accidental bodily disorder, in the nature of an injury, which was the cause of death.

The reasoning of the court, however, is erroneous since, following the authority of *Western Com. Trav.* v. *Smith,* 85 Fed., 401, which will be discussed later, it concluded that a "means" is accidental when it produces effects which are not themselves natural and probable consequences, and which would not ordinarily follow from their use. If this be true, then there would be liability where an insured voluntarily exerts himself in precisely the manner intended, receiving, in consequence of such exertion, an injury which is not the natural and probable consequence, and which would not ordinarily follow from the exertion. We have already shown that under the overwhelming weight of authority there is no liability in such a case, yet, for some unexplainable reason, many courts, and the textbook writers generally, have laid down the proposition promulgated by the court in the *Dent* and *Smith* cases and then, almost in the same breath, have stated there would be no liability in the hypothetical case just suggested.

The decision of the lower court in the *Dent* case was affirmed on appeal in 1914. That the Court of Appeals did not at all appreciate the point involved is indicated by the fact that it cites in support of its conclusion an English case construing the English Compensation Act. It is scarcely necessary to point out that the wording of the English act which, by the way, expressly covers occupational diseases, is entirely

dissimilar to that of the personal accident policy involved in the *Dent* case.

In the *Bailey* case it appeared that the insured attempted to inject morphia into his leg while in a buggy and that septicaemia resulted. The court, apparently without realizing the import of the decision in the *Barry* case, relied upon that case to sustain a statement that an unexpected result from usual and intentional means is effected through accidental means. The court's sweeping remarks in this connection are misleading and predicated upon a misunderstanding of the *Barry* case. Its conclusion can be justified, however, because there seems to have been some evidence that the horse started just as the insured was using the needle, causing him to insert it further than he intended. The necessary element of accidental means bringing about the accidental result seems, therefore, to have been present.

In the *Curry* case it appeared that the insured was shot and that his own misconduct was the occasion of the murderous assault upon him. The insuring clause was in the usual form. The court concluded that the injury was not accidental as to the insured because his conduct was such that he might have reasonably expected the injury to follow as the logical result thereof. This phase of the case will be discussed in connection with Proposition No. 11. It is apparent that the court had only occasion to determine as to whether the injury was accidental and not as to whether it was effected by accidental means. In its discussion the court apparently did not have clearly in mind this distinction and some of its obiter statements are inconsistent with what is believed to be correct doctrine. In considering the effect of this case it should be borne in mind that the only point at issue and the only point decided was that an injury received under the circumstances above indicated is not accidental. The result being non-accidental and there being therefore no liability, the court was not called upon to determine the character of the means producing such result.

In the *Maloney* case it appeared that the insured died from blood poisoning. The company contended that this disease was occasioned by a bed sore. Plaintiff introduced evidence indicating that it followed from an injury occasioned by being accidentally struck by a bed pan. The case was submitted to the jury which found for the defendant. The Supreme Court of Arkansas reversed judgment for the defendant, principally

because of certain instructions pertaining to the question as to whether the injury was the sole cause of death. In so far as this point is concerned the case will be discussed in a subsequent portion of the brief. The trial court also instructed the jury that if the injury was the natural and probable consequence of an action intended by those waiting upon Maloney, it could not be considered as having been effected by accidental means. The Supreme Court properly held this instruction to be erroneous. Obviously its effect was to tell the jury that an injury intentionally inflicted upon the insured by another person, was not effected by accidental means. As we have pointed out, under Proposition No. 10, this is not true.

The *Pack* case will be discussed in connection with the question of sunstroke under Proposition No. 12.

In the *Branum* case it appeared that insured died from apoplexy apparently caused by the excitement of witnessing a fire. The insuring clause under which claim was made was, however, not in the usual form and covered broadly "accidental death." The Texas Court of Civil Appeals concluded that it would not disturb a verdict in favor of the plaintiff, saying that under the circumstances of this case it was clearly a death by accident. Its conclusion was, of course, correct since the apoplexy and subsequent death were fortuitous, undesigned and unforeseen. In the same sense any death from disease would be accidental. If the insuring clause had been drawn in the usual way there would clearly, as a matter of logic, have been no liability in this case because no accidental means were shown. The result only was accidental. The court disposes of the point under discussion very briefly, citing a number of authorities which have little or no applicability. The conclusion is correct because of the peculiar insuring clause and the case is, therefore, not contrary to our position.

In the following cases the conclusion as well as the reasoning of the courts seems to be erroneous:

Western Com. Travelers v. *Smith,* 1898, 85 Fed., 401.
Miller v. *Fid. & Cas. Co.,* 1899, 97 Fed., 836.
Robison v. *U. S. H. & A.,* 1915, 192 Ill. App., 475.
Summers v. *Fid. Mut. Aid Assn.,* 1900, 84 Mo. App., 605.
Young v. *Railway Mail Assn.,* 1907, 126 Mo. App., 325; 103 S. W., 557.

Beile v. *Travelers Protective Assn. of Amer.*, 1911, 155 Mo. App., 629; 135 S. W., 497.
Hooper v. *Standard Life & Acc. Ins. Co.*, 1912, 166 Mo. App., 209; 148 S. W., 116.
Gallagher v. *Fid. & Cas. Co.*, 1914, New York, 163 Appellate Division, 556; 148 N. Y. Supp., 1016.
Bryant v. *Continental Cas. Co.*, 1916, Texas; 182 S. W., 673.

In the *Smith* case it appeared that the insured died from septicaemia resulting from abrasion of the skin on his toe, caused by friction of a tight shoe. The court said in substance that an effect which is the natural and probable consequence of an act is not produced by accidental means, but that if it is not the natural or probable consequence and is not intended to be produced, it is caused by accidental means. It cites a number of authorities laying down the correct rule in support of this erroneous conclusion. It is obvious that this conclusion is in conflict with those authorities holding that the unexpected result of a voluntary act, done in the way intended, is not due to accidental means. Here the insured intended to do exactly what he did, that is to put his foot in the shoe and place his toe in contact with same. As a consequence of this voluntary act, done in precisely the way the insured intended, an unexpected and unfortunate result occurred which was clearly accidental, but could hardly be said to be due to accidental means. The case is pretty close to the border line and while the reasoning is unsound the conclusion may perhaps be made to come within the true rule under the somewhat hypercritical and hair splitting theory that the insured did not intend that his toe should rub against the shoe, hence the accidental means, and neither did he intend that the rubbing should produce the abrasion, hence the accidental result.

In the *Miller* case the question was presented on demurrer to a declaration alleging that the insured had swallowed certain hard, pointed, resistant substances of food, which substances came in contact with his intestinal tissue in an accidental way, causing perforation and death. The court seems to have considered principally whether the means were external and violent and to have assumed that they were accidental. The demurrer to the declaration was overruled. The decision is brief, unsatisfactory and without citation of authorities. Construing the declaration against the pleader it would seem that the insured voluntarily swallowed the hard

substances of food and that an unexpected and accidental result followed. It is difficult to perceive any accidental means in this case, although, like the *Smith* case, it is close to the dividing line.

In so far as the *Smith* and *Miller* cases are contrary to the correct rule, they are buried and rendered innocuous by the great weight of Federal authority already referred to in detail, which supports that rule.

In the *Robison* case the Illinois Appellate Court reversed a judgment against an accident company on the theory that there could be no recovery where disease antedating the accident was a contributing cause in bringing about death. This case, therefore, squarely supports our position relative to the second branch of the insuring clause, which will be discussed in Chapter V. It appeared that the insured lifted a heavy stove, and, in so far as the opinion shows, did not slip or fall. The Appellate Court of Illinois, in a memorandum opinion, apparently without reference to any authority and without having had its attention called to the cases supporting our Proposition No. 1, seems to have assumed that an injury so occasioned would be considered as having been effected by accidental means. The case turned in favor of the company on another point, and, under the circumstances, it does not seem that the Illinois Appellate Court is at all committed to this doctrine. It will undoubtedly get right when its attention is directed to the long line of authorities laying down correct principles.

A reference to the Missouri cases cited above will indicate that in the *Summers* case the Kansas City Court of Appeals arbitrarily, without discussion, disregarded the plain terms of the policy and held the company liable. The *Hooper* case is also out of line with correct principles. In the other two to-wit, the *Young* and *Beile* cases, the attention of the St. Louis Court of Appeals seems to have been called to authorities laying down the correct rule, but the court simply refused to follow it. The *Beile* case can be distinguished on the ground that the insuring clause was not in the usual form, as it simply provided to pay death benefits "in case of death by accident." The decision is not, however, based upon this distinction.

In this connection the recent case of *Wright* v. *Order of United Commercial Travelers of America*, St. Louis Court of Appeals, 1915, 188 Mo. App., 457; 174 S. W., 833, is of in-

terest. In that case the insured on a hot day was sawing a board, in a cramped position, and fell dead. No post mortem was held. There was expert testimony for the plaintiff to the effect that the unusual exertion caused the rupture of a blood vessel which in turn occasioned death. The court, while apparently approving the Missouri decisions just discussed, held that there was no evidence to justify a verdict for plaintiff and that the expert testimony should not have been admitted, saying that it was purely hypothetical as to whether there was any rupture of a blood vessel or other similar injury. It is apparently conceded by the court, however, that had there been evidence of such an injury the fact that it was unexpected would have carried with it the legal inference that the voluntary means were accidental.

The *Gallagher* case involves the construction of a policy covering sunstroke effected by accidental means and will be discussed more at length in connection with the question of sunstroke under Proposition No. 12. The opinion of the court is based in a measure upon the construction of certain alleged ambiguous terms of the policy. It must be conceded, however, that the court does seem to hold that a sunstroke occasioned by voluntary acts, accomplished in the way intended, is, if unexpected, to be considered as having been effected by accidental means. We believe that the court's holding to this effect was inadvertent as it relies upon the *Barry* case, 131 U. S., 100, heretofore frequently referred to, where the holding was precisely to the contrary. The New York court also apparently entirely overlooked the previous New York decisions cited in support of Proposition No. 1, where the correct doctrine is strictly adhered to. The court apparently had in mind only the special sunstroke case before it. Inasmuch as no reference is made to the previous New York decisions, and as the court evidently misconceived the effect of the *Barry* case, it may be properly assumed that the principle announced in the *Gallagher* case was intended and will be hereafter considered to apply only to similar sunstroke cases. Incidentally, this decision is not yet final as appeal has been taken by the company to the court of last resort.

The *Bryant* case is another sunstroke case and will also be more fully considered in connection with that subject under Proposition No. 12. Like the *Gallagher* case the policy there construed covered sunstroke effected by accidental means. The trial court and the Court of Appeals found in favor of

the company on the theory that the sunstroke was not effected by accidental means because it occurred while the insured was going about his ordinary duties in the usual way. The Supreme Court of Texas reversed the decision of the two lower courts in a long and conflicting opinion which it is very difficult to analyze. Many reasons are advanced by the court in support of its conclusion, but it must be confessed that it does seem, because of a misconception of the effect of the *Barry* case, to believe that the result of non-accidental means is, if unexpected, to be considered as having been effected by accidental means.

We have grouped together the following authorities which are novel and interesting because of the peculiar facts involved. In all of these cases the court held for the company because it appeared that the accidental injury was not brought about by accidental means.

Fid. & Cas. Co. v. *Stacey's Exs.*, 1906, 143 Fed., 271, reversing same case entitled *Carroll* v. *Fid. & Cas. Co.*, 137 Fed., 1012. Insured struck man, cutting knuckle.

Herdic v. *Maryland Casualty Co.*, 1906, 146 Fed., 396; affirmed 149 Fed., 198. Subsequent to insuring clause policy provided that it "subject to its conditions covers death * * * resulting from septicaemia." Insured died from septicaemia following operation for appendicitis. The court said construing all parts of policy together, it only covered death from septicaemia brought about by accidental means.

Bryant et al. v. *Continental Casualty Co.*, 1912, 145 S. W., 636. Policy provided to pay "if sunstroke . . . due . . . to . . . accidental means shall result . . . in death." Insured while pursuing his ordinary business in the usual way suffered sunstroke, causing death. This case has recently been reversed by the Supreme Court of Texas. See *Bryant* v. *Con. Cas. Co.*, 1916, 182 S. W., 673. The decision of the Court of Appeals has, however, been approved in *Con. Cas. Co.* v. *Pittman*, 1916, Ga., 89 S. E., 716; *Elsey* v. *Fid. & Cas. Co.*, 1915, Ind., 109 N. E., 413; *Semancik* v. *Con. Cas. Co.*, 1914, 56 Pa. Superior Court Rpts., 392.

See also in this connection:

Bacon v. *U. S. Mut. Acc. Assn.*, 1890, 123 N. Y., 304; 25 N. E., 399, reversing 3 N. Y. Sup., 237.

H. P. Hood & Sons v. *Maryland Cas. Co.*, 1910, 206 Mass., 223; 92 N. E., 329.

Ætna Life Ins. Co. v. *Portland Gas. & Coke Co.*, 1916, 229 Fed., 552.

Maryland Casualty Co. v. *Glass*, 1902, 29 Tex. Civ. App., 159; 67 S. W., 1062.

In the *Bacon* case the insured died from malignant pustule occasioned by a virus which comes from the hair or wool of animals. The court concluded that this was nothing more nor less than a disease, somewhat similar to other infectious diseases such as smallpox, typhoid fever, etc.

In the *Hood* case, which involved the construction of an employer's liability policy, *not a personal accident policy*, an employe of the insured was infected with glanders because of the alleged negligence of the employer in putting him to work in a stall which had been occupied by a diseased horse. The court held there was liability under a policy insuring the employer against damages "on account of bodily injuries . . . accidentally suffered . . . by any employe." The court considered the *Bacon* case, however, and pointed out the distinction between the policy there construed and that before it, impliedly approving the decision in the *Bacon* case.

The *Portland Gas* case is another arising under an employer's liability policy and the construction of the phrase "accidental means" was not involved. The case is only mentioned here because of the danger of a misapprehension to the effect that such a case has application to the construction of a personal accident policy. It appears from the decision that the employer furnished its men with certain water, and, as a consequence, they contracted typhoid fever. The policy indemnified the employer against injuries accidentally suffered. Claim was made by the employer that he was entitled to reimbursement for damages recoverd by the employe. The court held that typhoid fever was an accidental injury within the meaning of the policy. As a matter of fact, the typhoid fever was accidental and the decision to this extent is correct. It, however, is not an injury if it be assumed that there is any distinction between the meaning of the words "injury" and "disease."

The *Glass* case is worthy of mention because the policy was so drawn that it covered death caused solely by "anæsthetics administered by a regular physician." The case is a freak one in that it is probably the only one in the books construing an accident policy providing to pay indemnity for death effected solely by a drug *not accidentally administered.* For a further discussion of it see page 89.

The following are cases in which the facts are unusual and interesting, and the courts held against the companies on the theory that there was evidence that the injuries causing the loss were effected by accidental means:

Jenkins v. *Hawkeye Com. Men's Assn.,* 1910, 147 Ia., 113; 124 N. W., 199. Insured unintentionally swallowed fishbone which caused laceration of intestine.

American Acc. Ins. Co. v. *Reigart,* 1893, 94 Ky., 547; 23 S. W., 191. Insured attempted to swallow a piece of beefsteak which accidentally passed into windpipe. This accidental means resulted in choking, causing death.

Omberg v. *U. S. Mut. Acc. Assn.,* 1897, 101 Ky., 303; 40 S. W., 909. Insured bitten by insect, causing septicaemia and death.

Maryland Cas. Co. v. *Ohle,* 1913, 120 Md., 371; 87 Atl. 763. Here it appears that the policy had attached a special rider covering disability from blood poisoning acquired through wounds suffered in professional operations. The insured, a physician, delivered a woman of child and a couple of weeks later found himself suffering from an infectious disease, which finally resulted in blindness. The company was held liable under the special rider.

Sullivan v. *Modern Bro. of Amer.,* 1911, 167 Mich., 524; 133 N. W., 486. Insured washing clothes, and water infected by virus from clothes splashed into eye, which accidental means brought about an unexpected inflammation and infection.

Johnson v. *Fid. & Cas. Co.,* 1915, 184 Mich., 406; 151 N. W., 593. Insured died from ptomaine poisoning caused by eating food not knowing same to be unsound.

Driskell v. *U. S. H. & A. Ins. Co.,* 1906, 117 Mo. App., 362; 93 S. W., 880. Scalding water fell into in-

sured's ear, which accidental means produced injury, causing death.

Farner v. *Mass. Mut. Acc. Assn.*, 1907, 219 Pa., 71; 67 Atl., 927. Insured was bitten by dog, causing septicaemia and death.

Maryland Cas. Co. v. *Hudgins*, Tex. Civ. App., 1903, 72 S. W., 1047; reversed 97 Tex., 124; 76 S. W., 745. Insured ate spoiled oysters not knowing that they were unsound. As a result of this act, *unintentional because the insured did not know the condition of the oysters*, an abnormal and unexpected condition was brought about, causing death.

Ætna Life Ins. Co. v. *Fitzgerald*, 1905, 165 Ind., 317; 75 N. E., 262. Insured fell asleep with hand under head and while unconscious moved hand, with head upon it, until it rested upon edge of bed. This undesigned means resulted in inflammation of periosteum of bones in hand. The conclusion is justified because hand was placed upon bed rail while insured was unconscious.

Van Eman v. *Fid. & Cas. Co.*, 1902, 201 Pa., 537; 51 Atl., 177. Insured fell asleep in car and jar of car knocked arm from under head. This accidental means brought about an injury which was alleged to have caused death.

Scheiderer v. *Travelers Ins. Co.*, 1883, 58 Wis., 13; 16 N. W., 47. Insured in dazed, unconscious condition walked onto platform of car and fell, receiving injuries which caused death.

Preferred Acc. Ins. Co. v. *Barker*, 1899, 93 Fed., 158. Insured accidentally became immersed in a bog to such an extent that he could not extricate himself and, as a result of this accidental means, was exposed to the vicissitudes of weather bringing about an unexpected and abnormal condition which caused death.

In each of these cases there was evidence that there was an element of accident in the means of bringing about the abnormal bodily condition which was the immediate cause of loss. In most of them that abnormal condition was in the nature of an injury, hence the principle applied was correct. In the *Sullivan, Hudgins* and *Johnson* cases, however, the loss was occasioned not by an *injury* effected through accidental

means, but by a *disease* effected through accidental means, without the intervention of what could properly be termed "a bodily injury." For a discussion of these three cases see page 55.

Proposition No. 5.

Where the insured is overcome by some bodily weakness or disease, as for instance dizziness, vertigo or fits, and as a consequence thereof falls into the water and is drowned, or falls before an approaching train, or upon the ground, thereby receiving injuries, there is liability under a policy insuring against loss resulting from injuries effected through accidental means.

Reynolds v. *Accidental Ins. Co.,* England, 1870, 22 L. T. Rep. (N. S.), 820. Insured bathing in ocean overcome by some unexplained internal cause, fell into shallow pool and drowned.

Winspear v. *Accidental Ins. Co.,* England, 1880, 6 L. R. Q. B. Div., 42. Insured fording a stream was seized with epileptic fit, fell into water and drowned.

Lawrence v. *Accidental Insurance Co.,* England, 1881, 7 L. R. Q. B. Div., 216. Insured standing on railroad platform was taken ill and fell forward in a fit across track and was killed by a passing engine.

Mfrs. Acc. Indemnity Co. v. *Dorgan,* 1893, 58 Fed., 945. Evidence indicated that insured while fishing might have been overcome by a temporary indisposition which caused him to fall into a shallow pool and drown.

Bohaker v. *Travelers Ins. Co.,* 1913, 215 Mass., 32; 102 N. E., 342. Insured, overcome by weakness caused by disease, fell from window sustaining fatal injuries.

Burnham et al. v. *Interstate Cas. Co.,* 1898, 117 Mich., 142; 75 N. W., 445. Evidence indicated insured while boating might have been overcome by sudden seizure causing fall into water and drowning.

Columbian Natl. Life Ins. Co. v. *Miller,* 1913, 140 Ga., 346; 78 S. E., 1079. Evidence indicated insured asphyxiated and that the asphyxiation was preceded and probably occasioned by insured being in a fainting or unconscious condition.

In this connection see also:

Noyes v. *Com. Trav. East. Acc. Assn.*, 1906, 190 Mass., 171; 76 N. E., 665. An insured seventy-six years old was walking on railroad platform and foot "gave way," causing fall. No evidence of disease or bodily defect. Court said injury "was entirely accidental," citing *Dorgan* and *Winspear* cases.

Interstate Cas. Co. v. *Bird, Admx.*, 1899, 18 Ohio Cir. Ct., 488. The facts do not appear. The court simply said "injuries caused by a fall due to a temporary and unexpected physical disorder are violent, external and accidental," citing *Meyer* v. *Fid. & Cas. Co.*, 96 Ia., 378; 65 N. W., 328, and the *Dorgan* case.

The last two decisions are not particularly helpful, as they are brief, the character of the insuring clauses construed is not indicated, and in the *Bird* case the facts do not appear.

The conclusion reached in the cases cited to Proposition No. 5 seems to be in reasonable accord with the general principle which we have heretofore laid down as being the correct one. In all of the cases the sudden seizure was purely undesigned and fortuitous and in that sense accidental. As a result of the happening of such an accidental event, that is to say as the result of accidental means, an unexpected bodily injury was brought about, causing death.

See, however:

Keefer v. *Pac. Mut. Life Ins. Co.*, 1902, 201 Pa., 448; 51 Atl., 366.

Merrett v. *Preferred Mas. Mut. Acc. Assn.*, 1894, 98 Mich., 338; 57 N. W., 169.

Rathman v. *New Amsterdam Cas. Co.*, 1915, 186 Mich., 115; 152 N. W., 983.

In these cases the courts seem to have assumed that an injury from a fall brought about by disease is not effected through accidental means.

Proposition No. 5 is not altered where the policy contains a provision in substance to the effect that it will not cover injuries caused by or arising from any disease.

Winspear v. *Acc. Ins. Co.*, England, 1880, 6 L. R. Q. B. Div., 42.

Lawrence v. *Acc. Ins. Co.,* England, 1881, 7 L. R. Q. B. Div., 216.

Both of the foregoing English cases are approved in *Mfrs. Acc. Indemnity Co.* v. *Dorgan,* 1893, 58 Fed., 945, which is in turn approved by *Burnham et al.* v. *Interstate Casualty Co.,* 1898, 117 Mich., 142; 75 N. W., 445, and *Bohaker* v. *Travelers Ins. Co.,* 1913, 215 Mass., 32; 102 N. E., 342; and *Columbian Natl. Life Ins. Co.* v. *Miller,* 1913, 140 Ga., 346; 78 S. E., 1079. The *Lawrence* case was disapproved in an *obiter* statement in the case of *Carr* v. *Pacific Mutual Life Ins. Co.,* 1903, 100 Mo. App., 602; 75 S. W., 180.

The Supreme Court of Canada has recently had occasion to distinguish the *Winspear* and *Lawrence* cases in the case of *Wadsworth* v. *Canadian Ry. Accident Insurance Co.,* 1914, 49 Canada Supreme Court Reports, 115. In this case it appears that the policy provided that if the injury "happened from fits" the company should only be liable for one-tenth the face of the policy. The insured had a fit and either dropped or knocked over a lantern, causing fatal burns. The plaintiff relied on the two English cases just mentioned. The Supreme Court of Canada, however, held they were not applicable because under the policy before it for construction the question was not as to whether the fit caused the death, but simply as to whether the fit caused the injury. Therefore the court concluded it had no occasion to determine whether the fit was the proximate cause of death, as it was manifest in any event that it was the proximate cause of the injury.

In this connection see also the recent case of *Layton* v. *Interstate Bus. Men's Acc. Assn.,* decided by the Supreme Court of Iowa in 1913, reported 139 N. W., 463, where it appeared that the insured committed suicide. Plaintiff claimed that the act causing the death "sprang from an insane impulse of a disordered and unsound mind" and that therefore the death was occasioned by injuries effected through accidental means. The policy provided that there should be no liability "if the occasion of the accident be bodily or mental infirmity." To avoid the effect of this provision plaintiff claimed the infirmity was temporary and momentary only. The court said in substance that if the insured was in such a condition of insanity that the injuries might be considered as effected through accidental means, it was clear from the evidence that such condition had existed for a long time and was not temporary and momentary, and hence there

would be no liability because the occasion of the accident under such circumstances would be "mental infirmity."

See also *Larkin* v. *Interstate Casualty Co.*, decided by the Supreme Court of New York, App. Div., in 1899, reported 60 N. Y. Sup., 205, where it does not appear from the opinion that the policy contained a provision for no liability if the injury resulted wholly or in part from disease, yet the court seems to assume that if the fall was occasioned by dizziness or vertigo there would have been no liability, concluding that it was for the jury to determine whether the fall was so occasioned.

Of course if the insured receives an injury through accident which causes a fall into water and consequent drowning, the company is liable. See *Mallory* v. *Travelers Ins. Co.*, Ct. Apps., N. Y. 1871, 47 N. Y., 52.

The English courts in arriving at the conclusion that where a man is overcome by a fit and falls into the water and drowns, or falls in front of an approaching train, the injury received is not caused by and does not arise from a disease or fit, take the position that in such cases the cause of the injury, or that from which it arises, is in reality the water in which the insured is immersed in the one case, and the aproaching train in the other. They argue that under these circumstances the disease is not the cause of the injury, but merely the cause of the insured being in a position to receive the injury.

As illustrative of this argument Judge Watkins in the *Lawrence* case suggested a case where a man while hunting should be seized with a fit and should retire to one side to recover, and while there should be shot accidentally by a companion, saying that if there was liability in such a case then there was liability in the case before him. In the last analysis this reasoning is based upon the thought that the presence of the water in the one case and the approaching train in the other constitute independent accidental events which are not themselves in any way brought about by the disease, such disease being only the cause of the insured being in the place where such accidental event occurs. These authorities, if their application be confined to circumstances of like character, seem to be sound and not in conflict with the holding in the *Layton* and *Larkin* cases.

Proposition No. 6.

Under the circumstances mentioned in Proposition No. 5, there is no liability if the contract contains a provision in substance to the effect that it will not cover loss resulting from or caused "directly or indirectly," or "wholly or in part," by or in consequence of disease.

Mfrs. Acc. Indemnity Co. v. *Dorgan,* 1893, 58 Fed., 945.

Com. Trav. Mut. Acc. Assn. v. *Fulton,* 1897, 79 Fed., 423; see same case 2nd appeal, 1899, 93 Fed., 621.

Thornton v. *Travelers Ins. Co.,* 1902, 116 Ga., 121; 42 S. E., 287.

Meyer v. *Fid. & Cas. Co.,* 1895, 96 Ia., 378; 65 N. W., 328.

Carr v. *Pac. Mut. Life Ins. Co.,* 1903, 100 Mo. App., 602; 75 S. W., 180.

Greenlee v. *Kansas City Cas. Co.,* 1916, Mo. 182, S. W., 138.

Rathman v. *New Amsterdam Casualty Co.,* 1915, 186 Mich., 115; 152 N. W., 983.

Taylor v. *Gen. Acc. Assur. Corp.,* 1904, 208 Pa., 439; 57 Atl., 830.

Clark v. *Employers' Liability Assurance Corp* , 1900, 72 Vt., 458; 48 Atlantic, 639.

In the *Dorgan* case there was evidence tending to show that the insured, while fishing, was overcome by some temporary disorder in the nature of faintness due to hunger or something of that sort, and fell face downward in shallow water, striking his head on a rock with sufficient severity to cause unconsciousness, and drowned.

Judge Taft, who wrote the opinion, laid great stress upon the fact that the policy excepted liability for loss resulting or caused "directly or indirectly, wholly or in part, by or in consequence of . . . any disease existing . . . ." He distinguished the *Dorgan* case from the *Winspear* and *Lawrence* cases, *supra,* on the theory that the words directly or indirectly, or their equivalent, were not used in the excepting clause construed in those cases. As a matter of fact in the *Lawrence* case the company did use those adjectives but the juxtaposition was such that under the doctrine of strict construction the English court held that they did not apply to modify and explain the excepting clause as the company

contended, saying, however, that there could have been no recovery if the policy had provided for no liability "in a case where the death is caused by an accident jointly with the fit."

Judge Taft concluded that if Dorgan was drowned by reason of being overcome by an existing disease, there was no liability under the terms of the policy, but held that under the evidence it was a question for the jury to determine whether the cause of the fall was "an existing disease" as distinguished from some temporary disorder, such as faintness from lack of food.

In the *Fulton* case it appeared that the insured fell and struck his head on an iron water pipe. An autopsy disclosed a diseased condition indicating that the fall might have been caused by disease and the court said that if the fall was due to disease, there was no liability.

In the *Thornton* case the policy provided there would be no liability for injuries resulting wholly or partly, directly or indirectly, from hernia. The insured was suffering from hernia, and while walking through a car was thrown by the motion of the car and the hernia became strangulated. The court held that if the injury was contributed to in any way by the pre-existing hernia, there was no liability. It referred to the *Lawrence* case and distinguished that case on the same ground that it was distinguished in the *Dorgan* case.

In the *Meyer* case the evidence showed that the insured, who had apparently always been in good health, was seen standing close to an electric light pole, staggering, with arm extended toward and about the pole as if endeavoring to embrace or grasp it. When next seen he was lying on his back. The fall resulted in a fracture of the skull causing death. The policy provided it would not cover injuries "resulting directly or indirectly from . . . vertigo . . . fits . . . or any disease or bodily infirmity." The trial court instructed the jury that if the fall was due to an attack of vertigo or fits, plaintiff could not recover and that if it was due to disease, plaintiff could not recover, but that the word "disease," as used in the policy, meant some ailment or disorder of a somewhat established or settled character, some physical disturbance to which he was subject and of which the attack that caused the fall was in some measure a recurrence, and that a mere temporary disorder arising from some sudden or unexpected derangement of the system would not be a disease within the meaning of the contract.

The Supreme Court approved this instruction, relying upon the *Dorgan, Winspear* and *Lawrence* cases among others.

In the *Carr* case it appeared that the insured was confined in a hospital suffering from la grippe, that he had a high fever and was delirious. The nurse left him for a moment, and when she returned he had left his bed and, upon rushing to the window, she looked out and saw him falling. The court referred to a number of authorities, including the *Lawrence* case, saying that the reasoning of the English court in that case did not impress it. It pointed out that the policy before it excepted liability for injuries "received while or in consequence of being or having been under the influence of or affected by or resulting directly or indirectly, in whole or in part from . . . disease or bodily infirmity," and concluded that under this exception and the facts there was no liability and that the lower court had erred in not directing a verdict for defendant.

In the recent case of *Greenlee* v. *Kansas City Casualty Company,* 1916, 182 S. W., 138, the Missouri court apparently approved of the instruction of the trial court to the effect that if the insured fell solely as the result of disease and received an injury, which caused his death, there would be no liability. To this extent the *Greenlee* case fully approves the holding in the *Carr* case, although it questions the correctness of that decision with reference to some other propositions.

The *Carr* case is approved in the recent case of *Rathman* v. *New Amsterdam Cas. Co.,* 1915, 186 Mich., 115; 152 N. W., 983, where the court held that if the insured while overcome by dizziness or disease, fell overboard into the water and was drowned, the company was not liable under a policy which excepted loss caused or contributed to by disease.

In the case of *Bohaker* v. *Travelers Insurance Company,* 1913, 215 Mass., 32; 102 N. E., 342, the court had before it a case in which the facts were almost identical with those presented in the *Carr* case, and arrived at a contrary conclusion. This case has already been cited in support of Proposition No. 5, and is not in conflict with the doctrine laid down in Proposition No. 6 for the reason that it does not appear that the policy construed expressly excepted liability on account of loss caused directly or indirectly or wholly or in part by or in consequence of disease.

In the *Taylor* case the insured, while mounting steps, fell

and received an injury. The court said that the burden was upon the plaintiff to prove, not only that the insured fell and died from the effects of the fall, but also that the fall was accidental and not the result of disease in any form.

In the *Clark* case it appeared that death was probably occasioned by the insured being overcome by apoplexy and falling in front of a wagon which ran over his neck, causing death. The policy was similar to that construed in the *Dorgan* case. The Supreme Court held that the trial court committed reversible error in refusing to instruct the jury that plaintiff could not recover, even if death was caused by the accident, providing any disease or bodily infirmity contributed thereto. In so holding the Supreme Court relied upon the *Dorgan* case and approved the reasoning whereby Judge Taft distinguished the *Winspear* and *Lawrence* cases.

An interesting case somewhat pertinent in this connection is *Ryan* v. *Continental Casualty Company,* decided by the Supreme Court of Nebraska in 1913, reported 142 N. W., 288. In that case the policy provided that "where the injury causing the loss results wholly or in part . . . from the intentional act of the insured or of any other person . . . the amount payable shall be one-fifth of the amount which otherwise would be payable." The insured was struck in the face by a companion who did not intend to kill him. The blow did not seriously injure assured's face but knocked him down, and in falling he struck his head on a cement sidewalk, resulting in fracture of the skull and death. It was contended by plaintiff that the death was not occasioned by the intentional act, but by the independent accident of the head coming into contact with the sidewalk. Plaintiff in his brief relied upon the *Dorgan, Winspear* and *Lawrence* cases. The court concluded that the injury causing the death resulted "in part" from an intentional act and that the company was therefore only liable for one-fifth the face of the policy.

See, also,

Pref. Acc. Ins. Co. v. *Muir,* 1904, 126 Fed., 926.
Ætna Life Ins. Co. v. *Hicks,* 1900, 23 Tex. Civ. App., 74; 56 S. W., 87.

In the *Muir* case the policy excepted liability where the loss resulted "wholly or partly, directly or indirectly," from disease. The insured while riding on a train became sick at his stomach, went out on the platform to vomit and was found

later, dead, beside the track. The court held that the term "disease," as used in the policy, did not mean a temporary indisposition, and that the slight derangement of the stomach from which Muir suffered, and which caused him to go out on the platform, was not a cause of death, within a fair meaning of the provision of the policy.

In the *Hicks* case the policy provided for no liability where the death resulted "wholly or partly, directly or indirectly, from . . . or while . . . affected (by) disease." There was evidence that the insured was ill with typhoid fever and while on a train went to the watercooler to get a drink. While standing there the train gave a sudden jerk, causing fall and injury. The court said that the burden was upon the defendant not only to prove that the insured was suffering from disease when the injury occurred, but also that the same was the proximate cause of the accident, and that, as the jury had found that it had nothing to do with the accident, and as such finding was permissible under the evidence, a verdict against the company could not be disturbed.

CHAPTER III.

Miscellaneous.

Negligence.

Proposition No. 7.

In the absence of special policy provisions to the contrary, the mere fact that the insured is negligent and that such negligence is a contributing factor in bringing about the accident, will not prevent recovery under an accident policy. This proposition is so generally conceded that we have not attempted to gather together all of the authorities in support of it. We cite the following as illustrative of the general rule:

Sutherland v. *Standard Life & Acc. Ins. Co.*, 1893, 87 Ia., 505; 54 N. W., 453.

Payne v. *Frat. Acc. Assn. of America*, 1903, 119 Ia., 342; 93 N. W., 361.

Fid. & Cas. Co. v. *Morrison*, 1906, 129 Ill. App., 360.

Providence Life Ins. & Inv. Co. of Chicago v. *Martin*, 1869, 32 Md., 310.

Duncan v. *Pref. Mut. Acc. Assn.*, 1891, 13 N. Y. Sup., 620; affirmed without opinion 126 N. Y., 622; 29 N. E., 1029.

Schneider v. *Prov. Life Ins. Co.*, 1869, 24 Wis., 28.

That the courts are never in entire accord on any proposition is evidenced by the fact that in one old case it was held that there could be no recovery under a policy insuring against injury "by accident," where the insured, while riding on a train, put his hand out of the window and accidentally struck a post, injuring his finger. The court concluded that this was not an accident, as the injury was brought about by the negligence of the insured. See *Morel* v. *Mississippi Valley Life Ins. Co.*, Ct. Apps., Ky., 1868, 67 Ky., 535.

Suicide and Intentionally Self-Inflicted Injuries While Sane.

Proposition No. 8.

An injury intentionally self-inflicted by the insured upon himself while sane is not effected through accidental means. This statement is so palpably true as scarcely to require citation of authority to support it, and we have not attempted to

gather together all of the authorities wherein it has been made. We call attention to the following:

Ætna Life Ins. Co. v. *Vandecar,* 1898, 86 Fed., 282.
Tuttle v. *Iowa State Trav. Men's Assn.,* 1905, 132 Ia., 652; 104 N. W., 1131.
Williams v. *U. S. Mut. Acc. Assn.,* 1892, 133 N. Y., 366; 31 N. E., 222, reversing 14 N. Y. Sup., 728.

Suicide and Intentionally Self-Inflicted Injuries While Insane.

Proposition No. 9.

In the absence of a provision in the policy excepting liability for suicide or injuries intentionally self-inflicted while insane, an injury inflicted by the insured upon himself while he is insane is effected through accidental means, even though the policy stipulates against liability for suicide or self-inflicted injuries. The following are the leading cases which support this well recognized proposition:

Acc. Ins. Co. v. *Crandall,* 1887, 120 U. S., 527, affirming 27 Fed., 40.
Tuttle v. *Iowa State Trav. Men's Assn.,* 1905, 132 Ia., 652; 104 N. W., 1131.
Blackstone v. *Standard Life & Acc. Ins. Co.,* 1889, 74 Mich., 592; 42 N. W., 156.
Berger v. *Pac. Mut. Life Ins. Co.,* 1898, 88 Fed., 241.

Where, however, the policy contains a provision to the effect that there shall be no liability where the death is caused by "suicide, sane or insane," many difficult and perplexing problems frequently arise in its construction. For some reason there are very few reported decisions considering the effect of this clause when contained in a policy of accident insurance, although the books are full of cases construing life insurance policies containing a similar clause. The United States Supreme Court in the *Crandall* case, and the Michigan court in the *Blackstone* case, seem to assume that the reasoning of these life insurance cases may properly be applied in a case involving an accident policy. The same assumption is indulged by the courts who have had occasion to consider these questions in more recent years.

There are two distinct lines of authority construing life insurance contracts providing for no liability where the insured shall die as the result of suicide "while sane or insane,"

or the equivalent of that phrase. Under one line of authority a life insurance company is not liable under a policy of this character if the insured, because of insanity, is unconscious and unmindful of the *moral* character of his act, but is liable, in spite of the exception, if the insured is so insane as to be unconscious of the *physical* nature and consequences of his act, that is to say, that the same will produce death. The other line of authority holds that there is no liability under a life insurance policy of this character for death occasioned by suicide, no matter what the degree of insanity.

As pointed out above, there are only a few reported cases where these questions have been decided in connection with the construction of an accident insurance policy. There seems to be little question, however, that the courts generally consider that the life insurance cases are applicable and will follow, in accident cases, the particular line of authority which appears to them as being the more logical, or which, because of geographical location, is binding upon them.

The following cases, construing accident policies providing for no liability in case of "suicide, sane or insane," have followed the first line of authorities mentioned above, to-wit, those holding that, notwithstanding the exception, the company is liable if the insured is so insane as to be unconscious of the physical nature and consequences of his act.

Streeter, Admr., v. *West. Union Mut. Life Acc. Assn.*, 1887, 65 Mich., 199; 31 N. W., 779.
Cady v. *Fid. & Cas. Co.*, 1907, 134 Wis., 322; 113 N. W., 967.
Vicars v. *Ætna Life*, 1914, 158 Ky., 1; 164 S. W., 106.

In the *Streeter* case the court, while apparently recognizing the doctrine in support of which we have just cited it, concluded that there was no evidence to justify the jury in finding that the insured was so insane as to be unconscious of the physical character of his act.

The *Cady* case is reported in 17 L. R. A. (N. S.), 260, and is there accompanied by exhaustive and valuable annotations presenting very fully the authorities in support of both rules mentioned above. The author of the note concludes that the great weight of authority supports the second, namely, that the company is not liable no matter what the character of the insanity.

In the *Vicars* case the court squarely laid down the doctrine

that notwithstanding the exception as to suicide, sane or insane, the company would be liable if the insured was so insane that he did not know he was taking his life or that the act he was committing would probably result in his death. In this connection, we call attention to a very interesting case recently decided by the same court, viz.: *Interstate Business Men's Assn.* v. *Atkinson,* 1915, 165 Ct. Apps. Ky., 532; 177 S. W., 254. The insurance company in this case had inserted a special clause in the policy suspending the insurance during such time as the insured might be insane. The Kentucky Court of Appeals held that this was a reasonable provision, and that under this particular policy the company would not be liable for suicide while insane, irrespective of the character of the insanity.

The leading cases considering this question in connection with the construction of an accident policy and holding that there is no liability for suicide while insane, irrespective of the character of the insanity, are:

Tuttle v. *Iowa State Trav. Men's Assn.,* 1905, 132 Ia., 652; 104 N. W., 1131.

Billings v. *Acc. Ins. Co. of No. Amer.,* 1892, 64 Vt., 78; 24 Atl., 656.

In the *Tuttle* case the court recognized the proposition that except for the presence of the exception as to suicide "sane or insane," the company would have been liable, saying that if the insured's act causing death "sprung from an insane impulse of a disordered and unsound mind, it was neither voluntary or intentional" but effected by accidental means. It then went on to point out that the contract excluded liability in case of death by "suicide while sane or insane" and concluded that this condition was valid.

In the *Billings* case the court considered the life insurance cases on both sides of the question and held that the better rule is that there is no liability under the exception, even though the insured is dominated and controlled by an irresistible impulse and is mentally incapable of understanding and appreciating the physical nature and consequences of his act.

See in this connection the case of

Layton v. *Interstate Bus. Men's Acc. Assn.,* Iowa, 1913, 139 N. W., 463,

where the court seems to approve the rule last laid down.

An interesting and peculiar case, which perhaps has some little bearing upon the proposition just discussed, is *Travelers Ins. Co.* v. *Melick,* U. S. Cir. Ct. Apps., 1894, 65 Fed., 178. In this case it appeared that the insured accidentally shot himself in the foot. The wound became very painful and the insured, who was a physician, and his attending physician feared tetanus and used certain drugs in an effort to ward off this disease. Their efforts were futile, as the insured while alone in his room was seized with tetanus, which causes very excruciating pain. Shortly afterwards he was found dead in bed, having evidently cut his throat with a scalpel. The policy provided that it would not cover "suicide sane or insane," and further provided that the company would not be liable if the accident or death resulted "wholly or partly . . . from . . . intentional injuries inflicted by the insured." The jury made a special finding that the shot wound was the proximate cause of the insured's death and the Court of Appeals said that therefore it was unnecessary to determine whether the knife cut was suicidal or accidental, since, under the finding of the jury, it was evident that the same did not cause the death. This case will be considered more fully in connection with questions presented in determining when an injury may be regarded as the sole cause of death.

Injuries Intentionally Inflicted Upon the Insured by Another Person.

Proposition No. 10.

When the insured receives an injury by the intentional act of another, and the insured is not at fault and does nothing calculated to bring about the assault, such injury is effected by accidental means. The courts seem to be uniform in holding to this effect. The following are some of the leading cases:

Travelers Ins. Co. v. *McConkey,* 1888, 127 U. S., 661; 8 Sup. Ct. Rep., 1360. Insured murdered by unknown person.

Ripley v. *Railway Pass. Assur. Co.,* 1870 Fed. Case No. 11854, affirmed in 1872, 16 Wal., 336. Insured murdered by robbers.

Robinson v. *U. S. Mut. Acc. Assn.,* 1895, 68 Fed., 825. Insured murdered by unknown person.

Hutchcraft's Exs. v. *Travelers Ins. Co.,* 1888, 87 Ky., 300; 8 S. W., 570. Insured murdered by robbers.

Fid. & Cas. Co. v. *Johnson,* 1895, 72 Miss., 333; 17 Sou., 2. Insured hanged by a mob.

See, also, cases cited to Proposition No. 11.

Injuries Intentionally Inflicted Upon the Insured by Another Person by Reason of the Insured's Own Misconduct.

Proposition No. 11.

Where the insured brings about an assault upon himself by his own wrongful act, or where he, under such circumstances that he would naturally be presumed to know that the injury is likely to be inflicted, voluntarily incurs an obvious hazard of this character, or places himself in a position that may be reasonably expected to bring about an assault upon him, an injury so received is not effected by accidental means.

Talliferro v. *Trav. Pro. Assn. of America,* 1897, 80 Fed., 368.

Prud. Cas. Co. v. *Curry,* 1914, 10 Ala. Apps., 642; 65 Southern, 852.

Price v. *Occidental Life Ins. Co.,* 1915, 169 Cal., 800; 147 Pac., 1175.

Hutton v. *States Acc. Ins. Co.,* 1915, 267 Ill., 267; 108 N. E. 296, reversing same case 186 Ill. App., 499.

Postler v. *Travelers Ins. Co.,* 1916, Cal.; 158 Pac., 1022.

In the *Talliferro* case it appeared that the insured had had trouble with his wife and left her. He subsequently called at a place where she had been boarding and was directed by one Frith, the landlord, to leave the house, as he had been warned not to return. After some discussion the insured said to Frith, "You must not insult me," and then said, "I must have revenge," and requested Frith "to put himself in shape," whereupon Frith pulled off his coat and the insured drew his pistol and struck him in the face. Frith then drew his own pistol and killed the insured. The court said that under the circumstances death could not be "regarded as accidental by any definition of that term which has heretofore been adopted," and concluded that the trial court was correct in directing verdict for defendant.

In the *Curry, Price, Hutton* and *Postler* cases the doctrine

announced in the *Talliferro* case is approved and followed under similar circumstances.

These five cases seem to be the only ones squarely in point in support of the foregoing proposition. It is, however, supported more or less directly by the following:

Robinson v. *U. S. Mut. Acc. Assn.*, 1895, 68 Fed., 825.

State Life Ins. Co. v. *Ford*, 1912, 101 Ark., 513; 142 S. W., 863.

Jones v. *U. S. Mut. Acc. Assn.*, 1894, 92 Ia., 652; 61 N. W., 485.

Supreme Council Order of Chosen Friends v. *Garrigus*, 1895, 104 Ind., 133; 3 N. E., 818.

Phoenix Acc. & Sick Bene. Assn. v. *Stiver*, 1908, 42 Ind. App., 636; 84 N. E., 772.

Travelers Ins. Co. v. *Wyness*, 1899, 107 Ga., 584; 34 S. E., 113.

Gaynor v. *Travelers Ins. Co.*, 1913, 12 Ga. App., 601; 77 S. E., 1072.

Hutchcraft's Exs. v. *Travelers Ins. Co.*, 1888, 87 Ky., 300; 8 S. W., 570.

Campbell v. *Fid. & Cas. Co.*, 1901, 109 Ky., 661; 60 S. W., 492.

Furbush v. *Maryland Cas. Co.*, 1902, 131 Mich., 234; 91 N. W., 135; see same case 2nd appeal, 1903, 133 Mich., 479; 95 N. W., 551.

Phelan v. *Travelers Ins. Co.*, 1890, 38 Mo. Apps., 640.

Lovelace v. *Trav. Pro. Assn. of America*, 1894, 126 Mo., 104; 28 S. W., 877.

Collins v. *Fid. & Cas. Co.*, 1895, 63 Mo. Apps., 253.

Hester v. *Fid. & Cas. Co.*, 1897, 69 Mo. Apps., 186.

Railway Offs. & Emps. Acc. Assn. v. *Drummond*, 1898, 56 Neb., 235; 76 N. W., 562.

Guildenkirch et al. v. *U. S. Mut. Acc. Assn.*, 1889, 5 N. Y. Sup., 428.

Erb v. *Com. Mut. Acc. Assn.*, 1911, 232 Pa., 215; 81 Atl., 207.

Accident Ins. Co. of No. Amer. v. *Bennett*, 1891, 90 Tenn., 256; 16 S. W., 723.

Union Cas. & Surety Co. v. *Harrold*, 1897, 98 Tenn., 591; 40 S. W., 1080.

Sunstroke and Freezing.

Proposition No. 12.

Where the insured comes to his death from sunstroke there is no liability under the usual form of accident policy, because sunstroke is a disease. If, however, the policy specially provides to pay for sunstroke effected by accidental means, the usual rule applies. In such case it must appear that the exposure or "means," as well as the resultant sunstroke, is accidental. The bodily infirmity brought about by freezing is an injury. If the exposure to the cold is involuntary, then there is liability under the usual insuring clause. Otherwise the injury cannot be considered as having been effected by accidental means and there is no liability.

Sinclair v. *Maritime Pass. Assur. Co.,* England, 1861, 3 Ellis & Ellis, 478.

Dozier v. *Fid. & Cas. Co. of N. Y.,* 1891, 46 Fed., 446.

Herdic v. *Maryland Casualty Co.,* 1906, 146 Fed., 396; affirmed, 149 Fed., 198.

Schmid v. *Ind. Trav. Acc. Assn.,* 1908, 42 Ind. App., 483; 85 N. E., 1032.

Feder v. *Ia. State Trav. Men's Assn.,* 1899, 107 Ia., 538; 78 N. W., 252.

Bryant et al. v. *Continental Casualty Co.,* 1912, Tex. Civ. App., 145 S. W., 636; reversed 1916, Texas Supreme Ct., 182 S. W., 673.

Elsey v. *Fid. & Cas. Co.,* 1915, Ind.; 109 N. E., 413.

Semancik v. *Con. Cas. Co.,* 1914; 56 Pa. Superior Court Rpts., 392.

Con. Cas. Co. v. *Pittman,* 1916, Ga.; 89 S. E., 716.

N. W. Com. Trav. Assn. v. *London Guarantee Co.,* Canada, 1895; 10 Manitoba Law Rep., 537.

Lenarick v. *Nat'l Cas. Co.,* Dis. Ct., St. Louis Co., Minn., January, 1912, reported Vol. 25, Ins. Law Journal (N. S.), p. 71.

There is a very prevalent belief among laymen and lawyers generally that there is liability under an accident policy for death due to sunstroke, irrespective of the circumstances under which this affliction occurs. This may, perhaps, be explained because the term itself carries with it the idea of violence in the nature of injury from a stroke or blow. As a

matter of fact the foregoing authorities establish that, as a legal proposition, at least, sunstroke is a disease in the nature of a brain fever produced by exposure to excessive heat, in the same sense that pneumonia is a disease engendered by exposure to cold, and in the same sense that many other maladies and ills to which human flesh is heir, occasioned more or less directly by exposure to the vicissitudes of climate or atmosphere, are diseases.

If then it be conceded, as it must necessarily be under the authorities, that the morbid bodily condition known as sunstroke is a disease as distinguished from an injury, it follows that even though a fatal disease of this character is brought about by the happening of an accidental event, there is no liability under the usual insuring clause. The courts say that the anatomical lesions brought about by exposure to excessive heat are pathological rather than traumatic. In a case of sunstroke, therefore, there is no element of bodily injury. It follows that even in cases where a fatal attack of the disease of sunstroke is brought about by the happening of an accidental event, it cannot logically be said that death is occasioned solely by bodily *injuries* effected through accidental means.

The first sunstroke cases decided by the courts involved the construction of policies which restricted liability to disability or death occasioned by injuries effected by accidental means. Since sunstroke is undoubtedly a disease there was, of course, no liability in these cases. It was unnecessary to determine whether the particular sunstroke was effected by accidental means or otherwise. The indispensable element of injury not being present, it was futile to inquire further as to whether the disease was effected by the happening of an accident. In the few sunstroke cases where claim was made under the general insuring clause, which the courts had occasion to consider, a correct decision was rendered, to-wit, that the company was not liable. In these cases, as will subsequently appear, the courts held unqualifiedly that sunstroke is a disease, and having so correctly held, they did, in one or two instances, go further, and by way of *obiter* statements intimate that there would have been liability had the sunstroke been effected by accidental means. These intimations were, of course, gratuitous, and were undoubtedly made inadvertently. Having once held that sunstroke is a disease, it requires no argument to demonstrate that it would be entirely illogical to hold the company liable for sunstroke under a policy covering

only loss resulting from injury. In any event, in the cases just referred to, the conclusion of non-liability was correct, and they held uniformly that sunstroke is a disease.

In considering the question of sunstroke, therefore, it may be laid down as a basic proposition that there is no liability for loss resulting from sunstroke under the usual insuring clause of an accident policy, any more than there would be liability for loss resulting from pneumonia or tuberculosis occasioned by exposure to inclement weather.

In recent years, however, many of the companies have inserted in their policies a special clause providing that the company will pay for death occasioned by sunstroke if the sunstroke be effected by accidental means. In other words, the companies have contracted to pay for loss occasioned by a well recognized disease if such disease be effected by the happening of an accidental event. Such action on the part of the companies is, of course, entirely illogical. They might just as well agree to pay for death occasioned by smallpox, in the event that such disease be contracted by an involuntary exposure. By giving this special coverage for disease in an accident policy, which is primarily intended to cover only loss resulting from a bodily injury, the companies have gone beyond the proper limits of this character of insurance.

It is true that they have restricted this coverage of loss resulting from a disease to cases where the disease is effected by accidental means; that is to say, to cases where the exposure is brought about against the will of the insured. A sunstroke can only be considered to be effected by accidental means in those exceptional cases where it appears that some accidental event has occurred, and, as a result thereof, the insured has been exposed to the heat of the sun in a way not intended. There must be an element of accident in the means bringing about the exposure. Inasmuch as it is only rarely that a sunstroke is effected in this manner, the courts which have had occasion to construe policies containing this special sunstroke clause have been impressed with its misleading character, and, while they have in almost every instance held for the company, they have done so reluctantly. In one or two instances they have taken the bit in their teeth and held the companies liable, the clear wording of the contract to the contrary notwithstanding. There is grave danger that in the future, particularly in cases which are not properly presented and argued, the courts may fall into error and follow these

authorities even in cases where liability is claimed under the general insuring clause. Therefore, the companies would do well if they would eliminate from their policies, designed to cover only loss occasioned by a bodily injury, this special clause providing to pay for loss occasioned by a disease.

These cases must not be confused with those cases where it has been held that death from disease is covered under the usual form of accident policy when such disease is itself occasioned by a bodily injury effected by accidental means. As will appear in a subsequent portion of this brief, there is liability in cases of the character just described. For illustration, suppose a case where the insured accidentally cuts himself. Clearly he has received a bodily injury effected by accidental means. If an infection follows and the insured dies from the disease of septicaemia, the bodily injury is regarded as the cause of death and the infection as only a link in the chain of causation. In an ordinary sunstroke case, however, the disease itself is the cause of death and no element of bodily injury is present.

The abnormal condition occasioned by exposure to excessive cold and generally termed "freezing," is, without doubt, to be considered as a bodily injury. In the few cases where the question has been presented, the courts have so held. In other words, there is liability for loss resulting from freezing under the usual insuring clause of an accident policy if it appears that the exposure to the cold has been brought about involuntarily in so far as the insured is concerned; that is to say, by accidental means. Some of the modern policies in the special sunstroke clause above referred to provide also to pay for loss resulting from freezing if the freezing is effected by accidental means. As a matter of fact, this special clause adds nothing at all to the general insuring clause. Under the general insuring clause there is liability for the result of injury effected by accidental means. Conceding that freezing is an injury, there is, therefore, liability under the insuring clause if the exposure to the cold is brought about by the happening of some accidental event and the situation, in so far as the liability of the company for loss resulting from freezing is concerned, is precisely the same, irrespective of whether the special freezing clause is included in the policy.

We shall now proceed to consider the sunstroke and freezing cases cited in support of Proposition No. 12.

In the *Sinclair* case the policy construed insured against

"any personal injury from, or by reason or in consequence of, any accident which should happen * * * upon any ocean, sea, river or lake." The insured was master of a ship and while in the usual course of his vocation was stricken by sunstroke from which he died. The court held that disease or death engendered by exposure to heat, cold, dampness, the vicissitudes of climate or atmospheric influences cannot be said to be accidental unless the exposure is brought about by circumstances giving it the character of an accident. It suggested that if a man exposed to the elements should catch cold and die, the death would not be accidental, although if shipwreck or other disaster necessitated the exposure, then death might properly be held to be the result of accident; that in one sense any disease is accidental, but that a disease not brought about by some fortuitous and unexpected circumstance is not considered as accidental.

Under the insuring clause the conclusion of the court is clearly correct. The argument, however, is scarcely logical, since the court said that a disease not brought about by a fortuitous and unexpected circumstance, is not considered as accidental. The court recognized that in one sense such a disease is accidental, and we have already pointed out that under the accepted definitions of that term any disease is accidental unless intentionally contracted. As a matter of fact, the policy did not provide to pay for accidental disease and it was not necessary for the court to determine whether the disease of sunstroke, from which the insured suffered, was accidental or not. The policy provided to pay for loss brought about by an *injury* occasioned "in consequence of any accident." The court might well have concluded that there was no injury, and hence that there was no liability. Such conclusion would be, as we have already pointed out, the logical one. It could also, as other courts have frequently done, have ignored this question and decided the case in favor of the company without determining whether the physical condition brought about by the exposure to the sun was a disease or an injury, because it was evident that whatever that condition was, and even though it was accidental, it did not result "in consequence of any accident."

In the *Dozier* case the policy insured against death resulting from "bodily injuries sustained through . . . accidental means." The plaintiff alleged in her petition that the insured while pursuing his ordinary occupation as a su-

pervising architect came to his death "by sunstroke or heat prostration." The court in sustaining a demurrer to the petition relied upon the *Sinclair* case and quoted from it *in extenso*. Incidentally it approved of a statement made in the *Sinclair* case to the effect that a disease produced by a known cause cannot be considered as accidental. This statement, as pointed out in the preceding paragraph, is incorrect, since a disease is usually accidental within the commonly accepted definitions of that term. Further than this, considering the question aside from the definitions of the term accident and in the light of the reported decisions, it is obvious that there are many cases where there is liability under an accident policy where a man dies from disease produced by a known cause. For instance, if an insured falls down and cuts his leg and septicaemia sets in, causing death, the company is liable, yet in such a case the disease is certainly produced by a known cause.

The conclusion of the court is clearly correct and much of its argument is sound. Among other things it demonstrates very conclusively that sunstroke is a disease. The flaw in the decision arises because of the failure of the court to appreciate the true meaning of the insuring clause. As in the *Sinclair* case the court might well have arrived at the same conclusion on the theory that there was no evidence of injury at all, or it might even have ignored this question and sustained the demurrer because there was no allegation in the petition that the sunstroke, whether it be considered as a disease or an injury, was "sustained through . . . accidental means."

In the *Bryant* case the policy contained a special clause to the effect that it would pay death indemnity for sunstroke if such sunstroke should be produced by "external, violent and accidental means." The parties stipulated that the insured, a bill collecter, walked about the streets of Houston, made more collections than usual and was overcome by the heat of the sun which was more intense than usual and thereby suffered a sunstroke which caused death independently of all other causes. The lower court and the Court of Appeals both held that there was no liability. The conclusion is clearly correct since the sunstroke, though accidental, was not brought about by any accidental means. That the decisions of the trial court and the Court of Appeals in the *Bryant* case

were correct has been expressly recognized in cases involving the construction of the same policy under similar facts.

See

Semancik v. *Con. Cas. Co.,* 1914, 56 Pa. Superior Court Reports, 392.
Elsey v. *Fid. & Cas. Co.,* 1915, Ind.; 109 N. E., 413.
Con. Cas. Co. v. *Pittman,* 1916, Ga.; 89 S. E., 716.

Notwithstanding this general approval of the decision of the Court of Appeals, the Supreme Court of Texas has recently reversed the decision.

See

Bryant v. *Con. Cas. Co.,* 1916, Texas; 182 S. W., 673.

The decision of the Supreme Court in this case is very long, involved and in many respects contradictory. The Court relies very strongly on the *Barry* case (*Barry* v. *U. S. Mut. Acc. Assn.,* U. S. Cir. Ct., 1885, 23 Fed. Rep., 712; affirmed in *U. S. Mut. Acc. Assn.* v. *Barry,* U. S. Sup. Ct., 1889; 131 U. S., 100) in support of its apparent conclusion that a result effected by non-accidental means, if such result is accidental, must be considered as having been effected by accidental means. A careful reading of the decision of the United States Supreme Court in the *Barry* case and the instructions given by the court below, which were approved by the Supreme Court, will demonstrate that not only does it not support the conclusion of the Texas Supreme Court, but, on the contrary, lays down a doctrine directly inconsistent therewith.

In the *Semancik* case it appeared that the insured, a common laborer, while performing his usual duties in the ordinary way was overcome by sunstroke and died. The policy involved was precisely the same as that construed by the Texas court in the *Bryant* case. The Superior Court of Pennsylvania, relying largely upon the decision of the Court of Appeals in the *Bryant* case, approved the holding of the lower court to the effect that the company was under no liability.

In the *Elsey* case it appeared that the insured took a street car ride on a very hot day and suffered a sunstroke, which sunstroke was, of course, accidental. The policy, however, only covered sunstroke effected by accidental means. The court followed the doctrine laid down by the Texas Court of

Appeals in the *Bryant* case and by the Indiana court in the *Schmid* case, and held that there was no liability.

In the *Pittman* case it appeared that the insured, while firing a locomotive on a very hot day, suffered heat prostration and consequent death. The policy involved was the same as that construed in the *Bryant* and *Semancik* cases. The Supreme Court of Georgia, relying upon the holding of the Texas Court of Appeals in the *Bryant* case, reversed judgment rendered by the court below for the plaintiff, holding that under these facts it was apparent that as a matter of law the sunstroke was not effected by accidental means and the company was not liable.

In this connection we call attention to the case of *Gallagher* v. *Fid. & Cas. Co.,* New York, 1914, 163 App. Div., 556; 148 N. Y. Supp., 1016, where the court arrived at a contrary conclusion. In this case the policy under construction was substantially identical with that involved in the three cases we have just discussed. The New York court, under similar facts, concluded that the company was liable on the theory that the resultant sunstroke, being accidental, it must be held, notwithstanding the non-accidental character of the means bringing it about, that such means were accidental. In support of its conclusion the New York court also relied strongly upon the United States Supreme Court decision in the *Barry* case. In so doing it entirely misapprehended the effect of that decision. A reference to it will disclose that in that case the insured jumped from a platform to the ground and there was evidence indicating that in so doing he got into an unexpected position and alighted heavily on his heels in a manner that he did not intend, thus receiving an injury. Both the means and the result were clearly accidental and the Supreme Court of the United States properly so held. In this connection, however, the court expressly laid down the doctrine that if the insured had jumped in the manner that he intended and alighted in the way that he expected, the resultant accidental injury could not be considered as having been effected by accidental means. Appeal has been taken from the decision of the New York court in the *Gallagher* case to the court of last resort, where it is now pending. Inasmuch as the New York Court of Appeals is already committed to the doctrine for which we are contending, it would seem that the decision of the lower court should

be reversed. In support of the statement that the Court of Appeals is committed to this doctrine, we call attention to

Appel v. *Ætna Life Ins. Co.*, 1903; 83 N. Y. Sup., 238; affirmed, 180 N. Y., 514.

See, also,

Niskern v. *United Brotherhood of C. & J. of America*, 1904, 87 N. Y. Sup., 640.

In the case of *Pack* v. *Prudential Cas. Co.*, 1916, 170 Ct. Apps. Ky., 47; 185 S. W., 496, the court had occasion to construe a policy containing the following clause:

> "If sunstroke, caused by the direct effect of the sun's rays, or freezing, septicaemia, hydrophobia, or the involuntary and unconscious inhalation of gas or other poisonous vapor, accidentally suffered by the insured, shall result directly, independently and exclusively of all other causes, in the death of the insured within ninety days from date of exposure or infection, the company will pay . . ."

The court held that under this policy the company was liable for death occasioned by sunstroke suffered while the insured was performing his usual duties in the ordinary way, and expressly disapproved among others the *Schmid* and *Elsey* cases, *supra*. In arriving at its conclusion, the court points out that a sunstroke is an accident. This, of course, is true. The court appears, however, to have entirely overlooked the distinction between accidental result and accidental means. It is to be noted that the policy here involved did not expressly limit liability to sunstroke effected by accidental means. The clause is somewhat different in that respect from that involved in the other cases which we have just considered. In the *Pack* case the policy covered sunstroke "accidentally suffered by the insured." We believe that the court might well have based its decision upon the peculiar wording of this clause. In other words, it is manifest that in this case the sunstroke was accidentally suffered. The language used by the casualty company does not clearly indicate that the means producing the sunstroke, as well as the sunstroke itself, must be accidental. We believe that the clause is ambiguous and, under the doctrine of strict construction, it should, of course, be resolved in favor of the insured. From this viewpoint the conclusion of the Kentucky court

appears to have been correct. That conclusion, however, is not based upon the distinction above indicated.

The *Lenarick* case is, as far as we know, the only one in the United States where the court has been asked to consider the question as to when loss of life or time occasioned by freezing may be regarded as the result of injuries effected through accidental means. In that case it appeared that the plaintiff, while working in the woods at his usual occupation, froze his foot. The court in a very able and well considered opinion, in which it relied upon the *Barry* case and several of the authorities cited above, came to the conclusion that the freezing was clearly brought about by the voluntary act of the insured done in the way intended, that there was no element of accidental means and that hence the company was not liable. The court apparently concedes that freezing is an injury and that the company would have been liable had the necessary element of accidental means been present.

In the Canadian case of *N. W. Com. Trav. Assn.* v. *London Guarantee Co.,* it appeared that the insured took a long ride in Canada on a cold night, the wagon broke down and he was frozen to death before help arrived. The necessary element of accidental means was present because the wagon broke down, hence, the freezing, *i. e.,* the injury, was effected through accidental means. The decision of the court, although it contains some contradictory statements, in the main supports the conclusions above set forth.

In the *Herdic, Schmid* and *Feder* cases, the point was not presented directly, but in all these cases the courts concluded that death from voluntary exposure to excessive heat or cold or the vicissitudes of climate, in the absence of any accidental means bringing about the exposure, cannot be considered as due to injuries effected through accidental means.

As an example of a case where death from exposure to cold was brought about by injuries effected through accidental means, we call attention to the case of *Pref. Acc. Ins. Co.* v. *Barker,* decided by the U. S. Cir. Ct. Apps., 1899, reported 93 Fed., 158, where the insured accidentally became immersed in a bog and being unable to extricate himself died from the effects of the exposure.

The only other sunstroke cases in the books are:

Ry. Officials & Emps. Acc. Assn. v. *Johnson,* 1900, 109 Ky., 261; 58 S. W., 694.

Continental Cas. Co. v. *Johnson,* 1906, 74 Kas., 129; 85 Pac., 545.

In the first case the policy provided that it would pay a limited indemnity for death due to sunstroke while not on duty. Applying the doctrine of strict construction, the court held that the company was liable for full indemnity if death from sunstroke occurred while on duty. In the second case the policy provided to pay for death due solely to sunstroke suffered while the insured was engaged in his occupation. The insured was overcome by heat from a furnace, causing illness and consequent loss of time. The court after an exhaustive review of the medical authorities concluded that sunstroke is a disease and that the disease may be produced by artificial heat as well as the direct rays of the sun. It held, therefore, that applying the doctrine of strict construction the company was liable on the theory that the terms of the policy covered loss resulting from heat prostration irrespective of whether the heat was artificial or natural.

Drowning, Poison and Gas.

Proposition No. 13.

Death occasioned by drowning, asphyxiation or by the taking of any poison when such casualty is not designed by the insured, that is to say when the act is not suicidal, is due to injuries effected through external, violent and accidental means.

Healey v. *Mut. Acc. Assn.,* 1890, 133 Ill., 556; 25 N. E., 52; reversing 35 Ill. App., 17. Death from accidentally taking overdose of chloral.

Mut. Acc. Assn. v. *Tuggle,* 1891, 39 Ill. App., 509; reversed, 138 Ill., 428; 28 N. E., 1066. Death from accidentally taking overdose of laudanum.

Travelers Ins. Co. v. *Dunlap,* 1896, 160 Ill., 642; 43 N. E., 765; affirming 59 Ill. App., 515. Death from accidentally taking carbolic acid when the insured intended to take medicine.

Tucker v. *Mutual Ben. Life Ins. Co.,* 1888, 4 N. Y. Sup., 505. Death from accidental drowning.

Clarke v. *Ia. State Trav. Men's Assn.,* 1912, Ia.; 135 N. W., 1114. Death from accidental drowning.

Paul v. *Travelers Ins. Co.*, 1889, 112 N. Y., 472; 20 N. E., 347; affirming 45 Hun, 313. Death from unconscious inhalation of gas.

Wehle et al. v. *U. S. Mut. Acc. Assn.*, 1897, 153 N. Y., 116; 47 N. E., 35; affirming 31 N. Y. Sup., 865. Death from accidental drowning.

Landon v. *Pref. Acc. Ins. Co.*, 1899, 60 N. Y. Sup., 188; affirmed without opinion, 167 N. Y., 577. Death from accidental drowning.

Pickett v. *Pac. Mut. Life Ins. Co.*, 1891, 144 Pa. State, 79; 22 Atl., 871. Death from unintentional inhalation of poisonous gas.

Trew v. *Ry. Pass. Assur. Co.*, England, 1861, 4 Law Times Reports (N. S.), 833; 6 H. & N., 838. Death from accidental drowning.

Winspear v. *Acc. Ins. Co.*, England, 1880, 6 L. R., Q. B. Div., 42. Death from accidental drowning.

Proposition No. 13 is now universally conceded to be correct although in a few early cases it was held that under circumstances such as mentioned in that proposition, the means, though accidental, were not external and violent. See:

Bayless v. *Travelers Ins. Co.*, 1877, Fed. Case No. 1138; 14 Blatch., 143. Where evidence justified conclusion that insured through inadvertence took more opium than he intended to take. This case was reversed by the Supreme Court, 113 U. S., 316, on the ground that the trial court had erred in taking case from the jury.

Healey v. *Mut. Acc. Assn.*, 1890, 35 Ill. App., 17. Where the insured accidentally took an overdose of chloral. This case was reversed by the Supreme Court, 133 Ill., 556; 25 N. E., 52.

Hill v. *Hartford Acc. Ins. Co.*, 1880, 22 Hun, 187. Death from taking poison by accident. This case was overruled in *Paul* v. *Travelers*, 1889, 112 N. Y., 472; 20 N. E., 347; affirming 45 Hun, 313.

Pollock v. *U. S. Mut. Acc. Assn.*, 1883, 102 Pa., 230. Death from drinking poisonous liquid thinking that it was not poisonous. The court distinguished this case in a rather unsatisfactory way in *Pickett* v. *Pac. Mut. Life Ins. Co.*, 1891, 144 Pa. State, 79; 22 Atl., 871, seeming to imply that where

the insured intends to swallow a particular liquid not knowing its poisonous character, the injury resulting is not effected by accidental means although the contrary would be true if insured did not intend to drink the liquid. This *obiter* statement, as has already been indicated, is in conflict with practically all the authorities.

It seems to have always been held that where death occurs under circumstances such as are mentioned in Proposition No. 13, the same is caused by *injuries* effected through accidental means. In these cases the morbid physical condition which causes death is undesigned and accidental, as is also the undesigned and accidental means bringing about the accidental result. The only question presented in reconciling this class of cases with general principles, which is at all difficult, is that arising in connection with the determination of whether the morbid physical condition causing death is a bodily injury. We have heretofore considered this question in some detail in our discussion of the freezing cases and have pointed out that the courts have held that, in certain peculiar border line cases, a bodily defect or lesion in the nature of an inflammation, congestion or solution of the continuity of the human anatomy, be it external or internal, is to be considered as a "bodily injury," within the meaning of that term as used in a policy of accident insurance. The courts have been content to state this proposition in general terms without reasoning it out logically. It is at any rate entirely equitable, since to hold otherwise would be to defeat the purpose of the insurance in a very large number of cases.

In addition to the drowning, poison, gas and freezing cases heretofore cited, the following cases, which have already been referred to, are worthy of careful consideration:

Sullivan v. *Modern Brotherhood of Amer.*, 1911, 167 Mich., 524; 133 N. W., 486.

Johnson v. *Fid. & Cas. Co.*, 1915, 184 Mich., 406; 151 N. W., 593.

Maryland Casualty Co. v. *Hudgins*, 1903, Tex. Civ. App., 72 S. W., 1047; reversed, 97 Tex., 124; 76 S. W., 745.

In neither of these cases did any bodily injury intervene as the effect of accidental means and the cause of the resulting fatal disease.

In the *Sullivan* case the policy construed insured broadly against the loss of an eye "by accident." There was evidence to the effect that while the insured was washing clothes some water which contained the germ of an infectious disease, which germ came from the clothes, splashed into her eye, causing the eye to become infected with that disease and consequent loss of sight. There was, of course, no bodily injury. The court held that under such circumstances the company was liable. Its decision was correct under the wording of the insuring clause before it. The loss of the eye was unquestionably caused "by accident." The loss was not, however, occasioned by injuries effected through accidental means. Unless this distinction is borne in mind the decision will in the future give rise to much uncertainty.

In the *Johnson* case the opinion does not disclose the precise wording of the insuring clause. The court says that death indemnity was payable in the event that "the insured comes to his death as the result of an accident." If the policy was drawn in this manner no question of accidental means would arise and, as a matter of cold logic, the policy would in reality be nothing more nor less than a policy of life insurance. As heretofore repeatedly emphasized, practically every death which is not suicidal must be considered as accidental, and, in the same sense, every disease is an accident. For the purpose of this discussion we shall, however, assume that the insuring clause was in the usual form. The evidence indicated that the insured had previously been in good health, and died from ptomaine poisoning occasioned by eating unsound food not knowing that it was unsound. If this was a fact, and the evidence so tended to indicate, then it must be conceded that there is basis for the contention that the morbid bodily condition known as ptomaine poisoning was effected by accidental means. In other words, the eating of the unsound food was unintentional and, therefore, accidental, and the consequent inflammation of the intestines might be said to have been effected by accidental means. The case was tried on the theory that this trouble was not occasioned by accidental means, but apparently no contention was made to the effect that the trouble, by whatever means occasioned, was not a bodily injury. We appreciate that it is impossible to formulate a definition of an injury which would absolutely exclude that

bodily infirmity which is usually considered as a disease. On the other hand, it is equally impossible to formulate a definition of a disease which would absolutely exclude the bodily infirmity ordinarily referred to as an injury. However, it is generally understood and conceded that these terms are not synonymous, and are not used as equivalents in policies of accident and health insurance. We believe that in this kind of a case the companies may properly and with good hope of success contend against liability on the theory just indicated. Ptomaine poisoning is generally considered to be what is commonly called a disease. It is not an injury in the sense in which that term is ordinarily used. This being true, it is not necessary for a court to determine in a case of this character whether the ptomaine poisoning was effected by accidental means. The entire matter may properly and finally be disposed of by a simple holding to the effect that it is not a bodily injury and hence not covered by a policy insuring against personal bodily injury.

In the opinion in the *Johnson* case, the Supreme Court of Michigan suggests that the case there before it is analogous to one where the insured takes carbolic acid by mistake. This illustration is not a happy one. In the first place, there is in such a case absolutely no question but what the burning occasioned by the acid is effected by accidental means, as the insured does not intend to take that substance at all. In the ptomaine case the insured does intend to take food, and to that extent does what he intends. The only possible element of accidental means arises because of the fact that the insured is unaware of the unsound condition of the food. In the acid case the searing and burning of the flesh by the acid produces what is commonly termed a bodily injury. Therefore, while it may be conceded that in a highly technical sense the inflammation occasioned by the ptomaine germs under circumstances of this character is effected by accidental means, it is most unfair that a court having gone to this extreme should go further and hold that the disease of ptomaine poisoning is a bodily injury. In the *Johnson* case this last proposition apparently was not raised by the company and is not considered by the court.

In the *Hudgins* case the policy covered death which should result, independent of all other causes, from bodily injuries effected through accidental means. The insured ate unsound oysters and, as a consequence, an inflammation was set up in

his stomach and bowels, causing death. The case turned largely on the interpretation of the clause of a policy excepting liability for injuries "resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled."

The Court of Appeals held that the necessary element of accidental means was present because the insured did not realize that the oysters were unsound at the time he ate them and seems therefore to have assumed that the death fell within the insuring clause. The court evidently did not appreciate that, even though the fatal condition was brought about by accidental means, that condition was not in the nature of an injury at all.

The Supreme Court reversed the Court of Appeals, relying principally upon the clause excepting liability as to poison, etc. Referring to the question of accidental means the court said that the plaintiff's position was based upon a "shadowy distinction" but that, irrespective of whether or not it was sound, there was no liability under the poison clause. Since the decision of the lower court, to the effect that the morbid condition was brought about by accidental means, carrying with it the further implication, although the question was not specially discussed, that the death was caused by *injuries* effected by accidental means, was not expressly disapproved by the Supreme Court, the *Hudgins* case is often cited as authority to sustain the statement that when an insured comes to his death from some physical disturbance or disease, brought about by the intentional swallowing of food, *without knowing that such food is unsound,* there can be recovery.

In reality the precise question just suggested was not determined by the Supreme Court, though, by implication, it disapproved of the holding of the Court of Appeals. In any event, we feel confident that there is no liability under such circumstances and that to so hold would be to take a long and unjustifiable step further than the courts have gone in the sunstroke, gas, poison, drowning and other similar decisions already discussed at length. If there is any liability under the insuring clause under circumstances such as were presented in the *Hudgins* case, there would be liability if an insured intentionally swallowed a glass of water without knowing that it contained typhoid germs and subsequently

contracted a fatal case of typhoid. Such a contention would be preposterous.

Proposition No. 14.

Bodily infirmities, when brought about by exposure to the vicissitudes of climate, by drowning, by the inhalation of gas, by the taking of poison or poisoned foods, by bodily exertion or fright, by the effect of a physical substance being brought into contact with the human anatomy, etc., etc., are due to *external* and *violent means.* In support of this statement we rely upon the cases heretofore cited to Proposition No. 13 and also upon the following cases which have heretofore been discussed:

Carnes v. *Ia. Trav. Men's Assn.,* 1898, 106 Ia., 281; 76 N. W., 683. Where the insured took an overdose of morphine.

Jenkins v. *Hawkeye Com. Men's Assn.,* 1910, 147 Ia., 113; 124 N. W., 199. Where the insured swallowed a fishbone which perforated his intestine.

American Acc. Ins. Co. v. *Reigart,* 1893, 94 Ky., 547; 23 S. W., 191. Where a piece of beefsteak which the insured was eating passed into his windpipe, choking him to death.

McGlinchey v. *Fid. & Cas. Co.,* 1888, 80 Me., 251; 14 Atl., 13. Where the death was occasioned either by fright or some involuntary physical exertion.

Dozier v. *Fid. & Cas. Co.,* 1891, 46 Fed., 446. Death from sunstroke.

Maryland Cas. Co. v. *Hudgins,* 1903, 97 Tex., 124; 76 S. W., 745; reversing 72 S. W., 1047. Where the insured ate unsound oysters.

Bryant et al. v. *Continental Casualty Co.,* Tex. Civ. App., 1912, 145 S. W., 636. Death from sunstroke.

N. W. Com. Trav. Assn. v. *London Guarantee Co.,* Canada, 1895, 10 Manitoba Law Rep., 537. Death from freezing.

While other authorities along the same line might be cited the proposition is so universally conceded that it seems unnecessary to do so.

CHAPTER IV.

Presumptions.

Many difficult and perplexing questions arise in connection with the presumption as to accidental means to be indulged when it is shown that the insured has received a bodily injury, causing death, but there was no eye witness to the event bringing about such injury. It must necessarily frequently happen that an insured receives an injury while alone. This injury may be effected through accidental means or it may be intentionally self-inflicted or it may be effected by other non-accidental means. If the insured dies as the result of such an injury it is of course impossible for the beneficiary to produce an eye witness of the occurrence and it is necessary to fall back upon circumstantial evidence and presumptions.

In this class of cases the beneficiary frequently attempts to prove that the injuries were received through accidental means by hearsay statements made by the insured prior to his death. These statements are, of course, only admissible as part of the *res gestae.* We shall not attempt in this brief to discuss the great mass of conflicting authority on this very abstruse and intricate doctrine of the law of evidence.

The authorities considering these questions naturally divide themselves into two divisions: (1) those where the insured is shown to have received some slight injury as a cut, scratch or bruise, and subsequently, after an intervening period of consciousness, dies as the result of such injuries; (2) those where the insured is found dead from an obviously fatal wound usually inflicted by firearms or by trains. In the latter class of cases the almost universal defense is that the insured committed suicide.

In all these cases it can be laid down as a general proposition, subject to a few exceptions, that the plaintiff has made out a *prima facie* case of liability under the insuring clause sufficient to go to the jury, when it has been shown that the insured died as the result of an obvious external bodily injury, such as a gunshot wound or a wound inflicted by a railroad train. The difficult questions presented usually arise in reference to the instructions given by the court to the jury as to the presumptions which the law indulges under such circumstances. These cases sometimes become much more complicated when, under the evidence, the fatal injury may have

been brought about by disease, and when the policy excepts liability under such circumstances.

It is fundamental that the law indulges in a presumption against suicide and murder, and against injuries intentionally self-inflicted, or resulting from a criminal assault. Relying upon these negative presumptions, the courts have frequently said that where it is shown that the insured has died under the circumstances mentioned in either of the foregoing classifications, there is a presumption that the injuries were effected through accidental means.

At this point it is well to call attention to the fact, which the courts have usually overlooked in their discussion, to-wit, that an injury intentionally inflicted by another upon the insured, when the insured is not at fault, is effected through accidental means. (See Proposition No. 10.) As just stated, there is, however, a presumption against an accident of this character.

In most cases the courts are not correct in saying that there is a presumption that the injury was effected through accidental means, since, where there is conflicting evidence, the law indulges in no affirmative presumption, but only indulges in the two negative presumptions just mentioned. Therefore when the injury is received under such circumstances that it can only be explained in three ways, namely, as intentionally self-inflicted, as intentionally inflicted upon the insured by another person, or as due to some accidental means other than felonious assault, we must, by a process of eliminative reasoning, arrive at the conclusion that having eliminated two of three possible hypotheses, the third only remains.

The negative presumptions above referred to are, however, not conclusive. They may be rebutted by evidence. In cases where there is absolutely no evidence in any way tending to rebut these presumptions it may be substantially correct to say that there is a presumption in favor of the third hypothesis. It must be remembered, however, that such a case is exceedingly rare In almost every instance the plaintiff in establishing her *prima facie* case introduces some evidence which may, in some slight degree at least, justify an inference of fact which may be sufficient in the minds of the jury to overcome the negative presumption. In nearly every case, therefore, there is no affirmative presumption that the injuries were effected through accidental means, and the effect of the negative presumption against self-in-

flicted injury can logically only avail the plaintiff to the extent of assisting her to make out a *prima facie* case, that is to say, a case where, taking into consideration the evidence and the presumptions referred to, it must be concluded that a question of fact is presented for the jury to determine.

In suicide cases the courts frequently fall into error in failing to distinguish between the essential character of an accident policy as distinguished from a life policy. The plaintiff suing on a life policy has made out a *prima facie* case under the insuring clause by showing that the insured is dead. On the contrary, a much heavier burden rests upon the plaintiff in a suit on a policy of accident insurance. In such a case it must be established that the death occurred in a particular way, to-wit, as the result of injuries effected through accidental means. We have already shown that suicide while sane is not an accident. (See Proposition No. 8.) Hence in cases where, under the evidence, the death may have been occasioned by accident or suicide, the plaintiff, being assisted of course by the negative presumptions referred to above, must establish by a preponderating weight of the evidence that the death was occasioned in the way alleged, to-wit, by injuries effected through accidental means, as distinguished from suicide. This is only another way of saying that where there is evidence tending to indicate suicide the burden is upon the plaintiff, assisted by the negative presumption, to establish that the injuries were effected through accidental means and not by suicide.

In this connection it must not be overlooked that where the issue is whether or not the insured committed suicide, plaintiff is assisted by a negative presumption against suicide in making out her case, but where the plaintiff claims that the death was the result of injuries intentionally inflicted upon the insured by another person, then she must overcome the negative presumption against felonious assault in establishing that kind of an accident.

Where the policy in addition to the usual insuring clause contains a further proviso in substance to the effect that it will not cover loss caused by injury resulting "wholly or in part," or "directly or indirectly," from disease or bodily infirmity and, under the evidence, it is possible that the injury causing death may have been brought about by the insured falling by reason of being overcome by a disease, it seems clear that the negative presumption against suicide or in-

tentionally self-inflicted injuries above referred to is not sufficient to enable the plaintiff to make out a *prima facie* case by merely showing the fact that the injury existed and was the cause of death.

The reason for this is obvious, since in such a case there are four possible explanations of the injury. It may have been intentionally self-inflicted, it may have been the result of a felonious assault, it may have been brought about by some accidental means other than felonious assault, or *it may have been caused by a fall due to disease.* In such a case, therefore, after indulging the two negative presumptions, there still remain two possible explanatory hypotheses, and where there is evidence under which the jury might ascribe the injury to either one of these two the law will indulge in no presumption as to the correctness of either, and in the absence of further evidence the plaintiff cannot go to the jury, since the court will not permit a jury to guess as to which of two equally plausible explanations is correct.

The same situation is presented in cases where the circumstances are similar to those involved in the case of *Carnes* v. *Iowa Trav. Men's Assn.,* decided by the Supreme Court of Iowa in 1898, reported 106 Ia., 281; 76 N. W., 683, heretofore referred to. In that case it appeared from the evidence that the insured died from an overdose of morphine; that he might have taken the exact amount he intended to take without realizing what its effects would be, or he might have taken a larger amount than he intended. The court said that if he intended to take the exact amount which he did take the unforeseen result could not be considered as having been brought about by accident, but that if he took more than he intended the contrary would be true. Under this state of the evidence the court concluded that the law indulged in no presumptions whatever and that the trial court had erred in permitting the jury to guess which of the two possible explanations was correct.

Proposition No. 15.

The plaintiff under an accident policy containing the usual insuring clause has made out a *prima facie* case sufficient to go to the jury when it has been shown that the insured had a bodily injury and that such an injury was the sole cause of death, whenever the circumstances are such that the injury must necessarily have been brought about in one of three

ways, namely, by being intentionally self-inflicted, by being intentionally inflicted upon the insured by another, or by accidental means not in the nature of a criminal assault.

Cases where the injury was a bruise, cut or scratch and the insured died after a period of consciousness:

Travelers Ins. Co. v. *Murray,* 1891, 16 Colo., 296; 26 Pac., 774. Insured was shown to have had a bruise and discoloration upon the abdomen.

Jenkins v. *Hawkeye Com. Men's Assn.,* 1910, 147 Ia., 113; 124 N. W., 199. Insured was shown to have received laceration of intestine from fishbone which he had swallowed.

Simpkins v. *Hawkeye Com. Men's Assn.,* 1910, 148 Ia., 543; 126 N. W., 192. Insured was shown to have had wound on hand apparently made by embalming needle.

Caldwell v. *Iowa State Trav. Men's Assn.,* Ia., 1912, 136 N. W., 678. Insured was shown to have had an abrasion on his face.

Vernon v. *Iowa State Trav. Men's Assn.,* Ia., 1912, 138 N. W., 696. Insured was shown to have had an abrasion on his leg.

Omberg v. *U. S. Mut. Acc. Assn.,* 1897, 101 Ky., 303; 40 S. W., 909. Insured was shown to have had red spot on toe presenting appearance of puncture or bite of insect.

Thompson v. *Loyal Protective Assn.,* 1911, 167 Mich., 31; 132 N. W., 554. Insured was shown to have had bruise on back.

Peck v. *Equitable Acc. Assn.,* 1889, 5 N. Y. Sup., 215. Insured was shown to have had a broken arm.

Rheinheimer v. *Ætna Life Ins. Co.,* 1907, 77 Ohio St., 360; 83 N. E., 491. Insured was shown to have had scratch on finger.

Cronkhite v. *Trav. Ins. Co.,* 1889, 75 Wis., 116; 43 N. W., 731. Insured was shown to have had bruise on back.

McCullough v. *Railway Mail Assn.,* 1909, 225 Pa., 118; 73 Atl., 1007. Insured was shown to have had bruise on temple and blood clot on brain.

Railway Mail Assn. v. *Harrington,* 1915, 220 Fed., 622. Insured shown to have bruise on abdomen.

In some of the cases just cited the trial court permitted plaintiff to introduce hearsay declarations made by the insured as to the manner in which the injury was received. In others there was very strong and persuasive circumstantial evidence supporting the theory that the injuries were received through accidental means. It seems that in all of them, under the evidence presented, there were only three possible explanations of the presence of the injury, to-wit, that it was intentionally self-inflicted, that it was inflicted intentionally by a person other than the insured, that it was effected by some accidental means other than a felonious assault.

In none of these cases was there any evidence under which a fourth explanation of the presence of the injuries would have been justified, hence the courts properly held that under such circumstances plaintiff had made out a *prima facie* case sufficient to go to the jury. In some of them the court, after pointing out that the plaintiff was aided by the negative presumptions above referred to, contented itself with saying that the case was for the jury. In others the court went so far as to say that there was a presumption that the injury was effected through accidental means, which, as we have pointed out, is substantially a correct statement when there is no evidence to the contrary.

The remarks of the court in the *Caldwell* case are very illuminating in this connection. In that case it was shown that the insured had an abrasion on his face and that he died as the result of such wound. There was no evidence as to how or when the wound was received. The court said there were weak places in the plaintiff's chain of evidence and the burden was at all times upon plaintiff to show that the death was occasioned by injuries effected through external, violent and accidental means; that in considering the question as to whether or not the wound was effected by accidental means, a presumption arose that it was not intentionally inflicted by the insured or another, which is almost equivalent to a presumption that it was effected through accidental means; that the authorities stop short of announcing the presumption in the last mentioned form, but hold that the first presumption is available to plaintiff as affirmative evidence and that an inference may be drawn therefrom by the triers of fact that the wound was caused by accidental means as the only other alternative.

The same questions as have just been discussed arise in

what we have heretofore referred to as suicide cases. We call attention to the following authorities of that character where the courts seem to have properly applied the principles just discussed, in holding that the plaintiff had made out a *prima facie* case by showing that the insured came to his death from drowning or from a gunshot wound, etc., and that it was for the jury to determine whether the injuries were effected through accidental means or with suicidal intent. (It has already been shown that death from drowning is considered as caused by injuries effected through accidental means. See Proposition No. 13.)

In the following cases the death was from drowning:

Couadeau v. *Amer. Acc. Co.*, 1894, 95 Ky., 280; 25 S. W., 6.

Farnsley's Admr. v. *Phila. Life*, 1914, 156 Ky., 699; 161 S. W., 1111.

Konrad v. *Union Cas. & Surety Co.*, 1897, 49 La. Ann., 636; 21 Sou., 721.

Mallory v. *Trav. Ins. Co.*, 1871, 47 N. Y., 52.

DeVan v. *Com. Trav. Mut. Acc. Assn.*, 1895, 36 N. Y. Sup., 931.

Landon v. *Pref. Acc. Ins. Co.*, 1899, 60 N. Y. Sup., 188; affirmed 167 N. Y., 577.

In the following cases the death was from gunshot wound:

Jenkins v. *Pac. Mut. Life Ins. Co.*, 1900, 131 Cal., 121; 63 Pac., 180.

Allen v. *Trav. Protective Assn.*, 1913, 163 Ia., 217; 143 N. W., 574.

Travelers Ins. Co. v. *Sheppard*, 1890, 85 Ga., 751; 12 S. E., 18. Death from gunshot wound or drowning.

Star Acc. Ins. Co. v. *Sibley*, 1895, 57 Ill. App., 315.

Union Cas. & Surety Co. v. *Goddard*, 1903, 25 Ky. L. Rep., 1035; 76 S. W., 832.

Ætna Life Ins. Co. v. *Milward*, 1904, 118 Ky., 716; 82 S. W., 364.

Ætna Life Ins. Co. v. *Rustin*, 1912, 152 Ky., 42; 151 S. W., 366.

Norman v. *Order United Com. Trav.*, 1912, 163 Mo. App., 175; 145 S. W., 853.

Guildenkirch et al. v. *U. S. Mut. Acc. Assn.*, 1889, 5 N. Y. Sup., 428.

Washburn v. *Nat'l Acc. Society,* 1890, 10 N. Y. Sup., 366.

Warner v. *U. S. Mut. Acc. Assn.,* 1893, 8 Utah, 431; 32 Pac., 696.

Miscellaneous:

Williams v. *U. S. Mut. Acc. Assn.,* 1892, 133 N. Y., 366; 31 N. E., 222, reversing 14 N. Y. Sup., 728. Run over by train.

Beard v. *Indemnity Ins. Co.,* 1909, 65 W. Va., 283; 64 S. E., 119. Fall from high wall.

In two cases at least the courts seem to have relied upon the proposition last referred to and permitted the plaintiff to go to the jury, when the overwhelming evidence indicated that the injuries were not received through accidental means, and where, under the evidence, a fourth explanation of the presence of the injuries would have been justified.

Pref. Acc. Ins. Co. v. *Fielding,* 1905, 35 Colo., 19; 83 Pac., 1013.

Travelers Ins. Co. v. *Hunter,* 1902, 30 Tex. Civ. App., 489; 70 S. W., 798.

In the *Fielding* case it was shown that the insured had certain burns on his body apparently from some acid. Under the evidence it was very possible that these burns were effected by the insured intentionally putting some strong lotion upon his body. If so, though the resultant injuries were accidental, they were clearly not brought about by accidental means. In the *Hunter* case the insured was shown to have had a badly swollen shoulder and ankle. The condition shown might under the evidence have been brought about by rheumatism or by accidental means. In both of these cases there was no eye witness to the alleged accident. Inasmuch as in each case there were two equally plausible explanations left after indulging in the presumptions against intentionally inflicted injuries, the trial court should not have permitted the jury to guess as to which of these remaining explanations was correct.

See, also, in this connection, the case of *Robinson* v. *Masonic Protective Assn.,* 1913, 87 Vt., 138; 88 Atl., 531, where the court held that a mere showing that the insured had a felon commencing the day after he had been handling some heavy material was sufficient to take the case to the jury on the theory that the insured had received an accidental bruise,

although there was absolutely no other evidence that the insured had received a bruise and the insured himself did not know whether he had done so.

In one Federal case the court seems to have concluded that the plaintiff by merely showing that the insured had a bruise, had not made out a *prima facie* case that such injury was effected through accidental means, sufficient to go to the jury.

National Assn. of Ry. Post. Clerks v. *Scott,* 1907, 155 Fed., 92.

In this case it was shown that the insured had a bruise on his shin. There was no evidence as to how the bruise was received. The principal question before the court was whether or not the bruise was the sole cause of death, and the court concluded that under the undisputed evidence it was clear that it was not the sole cause. It also held, however, that the plaintiff had not shown that the insured had received an injury through accidental means.

Another Federal case somewhat pertinent in this connection is

Nat'l Mas. Acc. Assn. v. *Shryock,* 1896, 73 Fed. Rep., 774.

In this case the principal question before the court was whether the injury was the sole cause of death, and the court held that it would not be regarded as the sole cause of death if the insured was suffering from a pre-existing disease and died because the accident aggravated the effects of the disease or the disease aggravated the effects of the accident. This phase of the case will be later considered in detail in connection with the discussion of the question as to when an injury may be regarded as the sole cause of death. The evidence showed that the insured had an abrasion on hip and knee which might have been produced by a fall. The trial court permitted the plaintiff to introduce hearsay statements that the insured made three or four hours after the alleged fall, to the effect that he had slipped, fallen and injured his leg. The Court of Appeals held this evidence was absolutely inadmissible as it was hearsay and its admission was reversible error.

The court does not seem to have considered the presumptions arising in assistance of plaintiff's case by a mere showing of the presence of the bruise, and judgment against the company was reversed.

See, also, in this connection,

David v. *Com. Mut. Acc. Assn.*, 1911, 166 Ill. App., 490,

where it was shown that the insured had cut his finger, resulting in blood poison and death. The Illinois Appellate Court held it was reversible error for the trial court to permit the physician to testify as to what the insured said as to the cause of the injury. The beneficiary claimed that even though this was error it was not prejudicial, because, having shown the wound and that the same was the cause of death, she had made out a *prima facie* case. The Appellate Court thought otherwise and reversed judgment against the company.

See, also:

Johns v. *N. W. Mut. Relief Assn.*, 1895, 90 Wis., 332; 63 N. W., 276.

In this case the insured was found drowned in a cistern. The evidence disclosed that the opening to the cistern was only 15 by 20 inches. The Supreme Court said that when the dead body of an insured is found under such circumstances that the injuries causing death may have resulted from negligence, accident or suicide, the presumption is against suicide and that, where there is evidence on both sides of the question, it is for the jury to determine whether death is accidental or intentional, and there is a presumption of accident. The court concluded, however, that it would assume that the insured was like any other man, had two legs and walked upon his feet; that while walking he stepped one foot at a time and that the other necessarily remained upon the ground until the step was completed; that if he accidentally stepped into the hole it could only be with one foot, and that foot would necessarily go down into the hole while the other foot remained on the ground; that his body, arms and hands would necessarily fall over and beyond the hole and that the court would take judicial notice that no ordinary man could go through such a hole unless he went head first or with both feet first; that it was very improbable if not impossible for a man walking upon the ground to fall into such a hole, either head first or with both feet first, by mere accident. The court concluded that under the evidence submitted the inference of suicide or self-destruction was sufficient to overcome any pre-

sumption of accident that might otherwise be indulged in, and reversed judgment against the company.

Another very interesting and illuminating case is:

Guardian Mut. Life Ins. Co. v. *Hogan,* 1875, 80 Ill., 35.

This was a suit upon a life insurance policy and the trial court instructed the jury as follows:

> "In case of death, and the evidence leaves the matter in doubt whether the deceased came to his death by an act of self-destruction or by accident, the law presumes the death to have occurred from accident."

The insured died from the effects of taking arsenic and the defendant company contended that the death was due to suicide. The Supreme Court said that the trial court erred in giving the instruction quoted above, since, although the policy was one of life insurance and the burden unquestionably upon the defendant to show suicide (which as we shall subsequently point out is not true where the policy is one of accident insurance), the instruction required even more than full proof, and, in effect, told the jury that if there was, under the evidence, any doubt of the fact that the insured destroyed himself, the law presumed the death to have occurred from accident. Therefore, no matter how strong the preponderance of evidence might have been to establish suicide, yet, if the jury had a doubt upon the subject, it was obliged to find against the defendant. The court concluded "that where there is the occurrence of death merely, and no evidence upon the subject, the presumption is, that it was from natural causes, and not an act of self-destruction. The presumption prevails in the absence of proof, or in case where the evidence on the point is equally balanced. This is the extent."

This case illustrates very clearly the self-evident proposition that it is reversible error for a trial court to instruct a jury, in a case where the evidence is conflicting, that there is a presumption of law that the death was due to accident. Further than this, in determining the effect of the statement of the court just quoted, it must be remembered that the policy under consideration was one of life insurance, where the burden was upon the defendant to show suicide. In a suit on a policy of accident insurance the burden is not upon the defendant to show suicide, but rather upon the plaintiff to show that the death was caused by injuries effected through accidental means. Suicide is not an accident, and therefore

the burden is upon the plaintiff in a suit on an accident policy, where the evidence is conflicting as to whether death was due to suicide or accident, to establish by a preponderance of the evidence that the death was not due to suicide. In such cases plaintiff is assisted in fulfilling this burden by the rebuttable presumption against suicide. Therefore in an accident case, where the evidence, without reference to the presumption, is equally balanced, the presumption against suicide is sufficient to warrant a verdict for the plaintiff. But if the plaintiff's evidence, as supplemented and assisted by the presumption, is equally balanced by the evidence indicating suicide, then the verdict must be for the defendant. This statement will be more fully amplified and supported by authority in connection with our discussion of cases cited to Proposition No. 17.

Proposition No. 16.

Even where the plaintiff has shown that the insured had some bodily injury and that this injury was the sole cause of death, the case, in the absence of testimony as to how the injury was received, cannot properly be permitted to go to the jury, when the presence of the injury may be explained in the three ways mentioned in Proposition No. 15, and when also the evidence affords another plausible explanation under which there would be no liability.

Carnes v. *Iowa State Trav. Men's Assn.*, 1898, 106 Ia., 281; 76 N. W., 683.

Klumb v. *Iowa State Trav. Men's Assn.*, 1909, 141 Ia., 519; 120 N. W., 81.

Keefer v. *Pac. Mut. Life Ins. Co.*, 1902, 201 Pa., 448; 51 Atl., 366.

Merrett v. *Pref. Mas. Mut. Acc. Assn. of Amer.*, 1894, 98 Mich., 338; 57 N. W., 169.

In the *Carnes* case the court said that if the insured took a larger dose of morphine than he intended, his death therefrom would be considered as due to injuries effected by accidental means, but that if he took the exact amount intended, being only mistaken as to the result, the contrary would be true, and held that, as, under the evidence, either explanation was equally plausible, there was nothing to go to the jury, and the trial court had erred in not directing a verdict for the defendant.

In the *Klumb* case the evidence showed that the decomposed body of an insured was found in a ravine with a round hole in his shirt, which might have been produced by a bullet, or might have been produced by worms, flies or other insects. Plaintiff contended that the death was occasioned by a stray bullet. The court held that the case could not go to the jury on this evidence, as there was only a possibility that the death might have resulted from a stray bullet, and there was no more reason to think that the death was occasioned in that manner than that it resulted from some of the maladies generally known to produce death in cases of persons apparently in good health. It concluded that the action of the trial court in directing a verdict for the defendant was correct.

In the *Keefer* case it was shown that the insured, apparently in good health, returned from a walk, with a bruise on his forehead and scratches on his face. The attending physician was unable to say definitely what was the cause of death, which occurred two days later, and the defendant produced evidence to the effect that the death resulted from uraemic poisoning. The Supreme Court held that the trial court properly refused to permit the plaintiff to show that Keefer had said, fifteen minutes after the alleged accident, that he had fallen on loose stones in the path. The court also said that it was just as likely that the fall resulted from apoplexy or other disease as from accidental means, and that the jury should not be permitted to guess which.

We have already indicated that, in the absence of a special policy provision to the contrary, an injury produced by a fall which is occasioned by the insured being overcome with disease, is considered as being due to accidental means (see Proposition No. 5), but that the contrary is true where the policy contains a special clause excepting liability under such circumstances (see Proposition No. 6). In the *Keefer* case it does not appear whether the policy contained a provision bringing it within the proposition last mentioned. If there was a policy provision stipulating for no liability where the injury was caused directly or indirectly, wholly or partly by disease, then the decision is undoubtedly correct. If, however, there was no such limiting clause, the decision is not correct, since it was not necessary for the jury to determine whether the fall resulted from disease or not, the company being liable in either contingency, provided that the injury was the sole cause of death. The *Keefer* case is approved in

Taylor v. *General Acc. Assur. Corp.*, 1904, 208 Pa., 439; 57 Atl., 830.

The court there held that where the evidence is such that it is equally probable that the fall may have been occasioned by disease or by accidental means, the law will indulge in no presumption in favor of either and plaintiff fails to make out a *prima facie* case. It concluded, however, that the case was for the jury, because there was an actual eye witness to the fall and the great preponderance of evidence supported the theory that it was occasioned by a slip, rather than by disease.

In the *Merrett* case it appeared that the insured was found dead with a rope tied about his neck and a bruise and discoloration upon his right temple. There was also a discolored ring around his neck. Some evidence was introduced indicating that the insured, a short time before, had been struck over the eye with brass knuckles. A brick was found near the body. The court seems to have assumed that the bruise over the eye was the cause of death, and said that such bruise might be explained in several ways: (1) that some person struck him; (2) that he struck himself with the brick with suicidal intent; (3) that he fell upon the brick; (a) after hanging himself, (b) by falling in a faint, (c) by falling in a fit of apoplexy, (d) by falling from heart failure.

The court concluded that under the circumstances there was nothing to go to the jury, and reversed judgment against the company. The court does not refer to the presumption against intentionally inflicted injuries which, in so far as taking the case to the jury is concerned, effectually disposes of Nos. 1, 2 and 3a, above. The other possible explanations referred to by the court, 3b, c and d, are in reality all the same, to-wit: that the fall might have been due to disease. The insuring clause of the policy does not appear. If under the policy an injury due to a fall from disease was not covered, the holding appears to have been correct. If there was no such provision in the policy the decision seems to have been wrong for reasons mentioned in our discussion of the *Keefer* case, *supra.*

In another somewhat similar case, to-wit:

Larkin v. *Interstate Casualty Co.*, 1899, 60 N. Y. Sup., 205,

it appeared that the insured received an injury by falling on a polished hardwood floor. The evidence indicated that he

was in good health and there was no proof that the fall was caused by disease. The court said that if there had been any evidence, even though slight, to justify a conclusion that the fall was occasioned by dizziness or vertigo, it might be contended that the plaintiff must negative the inference that he fell on this occasion from a similar cause, but, as there was no such evidence, the case was properly permitted to go to the jury.

See, also, in this connection, the following interesting cases:

Tennant Admr. v. *Travelers Ins. Co.*, 1887, 31 Fed., 322.

Globe Acc. Ins. Co. v. *Gerisch*, 1896, 163 Ill., 625; 45 N. E., 563; reversing 61 Ill. App., 140.

Farnsley's Admr. v. *Philadelphia Life Ins. Co.*, 1914, 156 Ky., 699; 161 S. W., 1111.

Wright v. *Order United Com. Trav.*, 1915, 188 Mo. App., 457; 174 S. W., 833.

In the *Tennant* case the evidence showed that the insured was found dead in a plunge bath in a standing position, with his right hand holding to pipe, head drooped, with water over nose, abrasion between eyes, and bruise on side of head. There was evidence that the insured was a heavy drinker and that his habits had made him subject to epileptic fits. There was also evidence that he had been drinking heavily shortly prior to death, that the temperature of the bath would likely cause epilepsy, and that the blow on the head was not sufficient to cause death. The court concluded that under the evidence it was clear that the death was not within the insuring clause and found for the defendant.

In the *Gerisch* case the exact wording of the insuring clause does not appear. It was averred in the declaration that the insured "accidentally, severely and fatally strained and injured his body in the abdominal region by lifting a box of ashes and cinders, from which strain and injury he died." If the insuring clause was that now generally in use, it is evident that the declaration was susceptible to demurrer, since such injuries, in the absence of a slip or fall or other accidental happening, would not be due to accidental means. That question was, however, not considered by the court, and judgment against the company was reversed on another ground. Plaintiff showed that the insured on the evening on which it was claimed he was injured was seen shoveling ashes and

cinders from a furnace into a wooden box in which he usually carried them to the street. No one saw him lift or carry out the ashes, but they were as a matter of fact carried out that evening. The court said that while there was no direct evidence that the insured lifted the box and carried out the ashes, that fact might be inferred from the evidence. It appeared that the death was due to dropping of bowels through an adhesive and unnatural growth. The court concluded that while there was evidence from which the jury might infer that the insured lifted the box and carried out the ashes, there was no evidence that the injuries were received by reason of that act, that a presumption could not be based upon a presumption, and that the trial court had erred in not directing a verdict for the defendant.

In the *Farnsley* case it appears that the plaintiff introduced only evidence to the effect that the insured was dead and that his death resulted from drowning. None of the surrounding circumstances were shown. The defendant offered no evidence. The plaintiff relied upon the cases holding that where it is shown that an insured has met death from drowning the presumption against suicide or crime is sufficient to take the case to the jury. The Kentucky Court of Appeals, however, held that this principle has no application except in cases where the circumstances are shown to be of such a character as to indicate that the insured either came to his death from accidental drowning or from suicidal drowning or as the result of a felony. The court, therefore, concluded that there being no evidence of the surrounding circumstances the cases relied upon by plaintiff had no application. It is very difficult to follow the logic of the court, and hard to perceive in what respect the case would have been different had the plaintiff done what the court seems to have held she should have done, namely, introduced evidence to the effect that she had been unable to find any eye witness to the drowning and that the corpse had been found in a certain body of water at a certain time of day, etc.

In the *Wright* case it appeared that the insured on a hot day was sawing a board while in a cramped position. While so doing he fell dead. No autopsy was performed. At the trial expert witnesses testified that in their opinion death resulted from a ruptured artery and that the ruptured artery was occasioned by the unusual exertion and cramped position. The St. Louis Court of Appeals held that there being no

showing that the artery actually had been ruptured, it was necessary in order to find for the plaintiff to base a presumption upon a presumption; that this could not be done, and hence judgment against the company was reversed.

Proposition No. 17.

In a suit on a policy of accident insurance, where the issue to be determined is whether the injuries causing death were effected through accidental means or by the suicidal act of the insured, the law indulges in a presumption against suicide, and by the aid of this presumption the plaintiff makes a *prima facie* case, sufficient to go to the jury, by showing that the death was occasioned by a bodily injury effected through external and violent means, without showing by direct evidence that the same was effected through accidental means. Where, however, the evidence is conflicting, the presumption against suicide is not sufficient to place upon the defendant the burden of showing that the injuries were inflicted with suicidal intent. On the contrary, the burden is upon the plaintiff throughout, assisted by the presumption just referred to, to establish by a preponderance of all the evidence that the injuries were effected through accidental means and were not intentionally self-inflicted.

Fid. & Cas. Co. v. *Weise,* 1899, 182 Ill., 496; 55 N. E. 540, reversing 80 Ill. App., 499.

Wilkinson v. *Ætna Life Ins. Co.,* 1909, 240 Ill., 205; 88 N. E., 550, affirming 144 Ill. App., 38.

Bernick v. *Ill. Com. Men's Assn.,* 1912, 175 Ill. App., 511.

Taylor v. *Pac. Mut. Life Ins. Co.,* 1910, 110 Ia., 621; 82 N. W., 326.

Bohaker v. *Travelers Ins. Co.,* 1913, 215 Mass., 32; 102 N. E., 342.

Laessig v. *Travelers Pro. Assn. of Amer.,* 1902, 169 Mo., 272; 69 S. W., 469.

Whitlatch v. *Fid. & Cas. Co.,* 1896, 149 N. Y., 45; 43 N. E., 405, reversing 28 N. Y. Sup., 951.

Hill v. *Central Acc. Ins. Co.,* 1904, 209 Pa., 632; 59 Atl., 262.

The courts in considering this question have frequently overlooked the distinction between accident and life insurance. As we have heretofore pointed out, suicide while sane is not

an accident, and death occasioned thereby is not covered under the insuring clause of an accident policy. In other words, intentionally self-inflicted injuries are not considered as being effected through accidental means.

One suing upon a policy of life insurance has only to show that the insured is dead to establish a loss within the terms of the insuring clause. One suing on an accident policy must show that the death was occasioned by injuries effected through accidental means. The distinction is obvious and vital. It requires no citation of authority to support the proposition that the burden is always upon one asserting the affirmative of any issue, to establish his allegations by a preponderance of the evidence. A plaintiff suing on a policy of accident insurance alleges that the death was occasioned by injuries effected through accidental means. If injuries are intentionally self-inflicted they are not effected through accidental means. Where, therefore, the issue is suicide, it would seem very clear that the burden is upon one asserting that the injuries were caused by accidental means, to establish, by a preponderance of the evidence, that they were not intentionally self-inflicted. Of course in a suit on a policy of life insurance, where suicide is an excepted risk, the burden is always upon the defendant to establish this defense.

Failing to appreciate the distinction, the courts have sometimes instructed the jury that the burden is upon the defendant accident insurance company to show that the death was due to suicide. For reasons just mentioned, such an instruction is clearly incorrect. It simply amounts to an instruction that the defendant must show that the injuries were not effected by accidental means, whereas the true rule is that the plaintiff must show that they were so effected. In establishing her case, the plaintiff is always assisted by the presumption against suicide, and, in the absence of any evidence tending to overcome that presumption, the plaintiff has fulfilled the burden which rests upon her by simply showing that the insured died as the result of a bodily injury effected through external and violent means. If, under such circumstances, the defendant fails to introduce any evidence, the trial court should properly direct a verdict in favor of the plaintiff. See the *Wilkinson* case, *supra*. Where, however, the evidence is conflicting plaintiff must, with the assistance of the negative presumption against suicide, convince the jury by a preponderance of the evidence, considering that

presumption as part of the evidence, that the death was not due to suicide. There is, of course, a burden upon the defendant to introduce evidence *tending* to overthrow the presumption against suicide, and if it fails to do so the court must direct a verdict for the plaintiff.

We believe that the foregoing statements are fully supported by the authorities cited in support of Proposition No. 17.

The following cases are sometimes cited as enunciating a doctrine inconsistent with it:

Travelers Ins. Co. v. *McConkey,* 1888, 127 U. S., 661; 8 Sup. Ct. Rep., 1360.

Furbush v. *Maryland Cas. Co.,* 1902, 131 Mich., 234; 91 N. W., 135 (same case 2nd appeal, 133 Mich., 479; 95 N. W., 551).

Vicars v. *Ætna Life,* 1914, 158 Ky., 1; 164 S. W., 106.

A careful analysis of these authorities will, however, disclose that they are in reality practically in accord with what we have stated to be the law.

In the *McConkey* case it appears that the trial court instructed that the burden was on the defendant to establish suicide by the preponderance of evidence. The Supreme Court, however, apparently appreciated the true rule, and while it said that the burden was upon the defendant to overcome the presumption against suicide, it also said that the burden was upon the plaintiff, with the assistance of this presumption, to show that the death was occasioned by injuries effected through accidental means.

In the *Furbush* case (2nd decision) the court approved instructions of the trial court to the effect that the burden was upon the plaintiff to show that the injuries were effected through accidental means and therefore she had the burden of proving that the insured did not commit suicide, and that the burden was upon the plaintiff all the way through. For some unexplainable reason, the court wound up by saying that unless the jury were able to say from the fair weight and preponderance of the evidence that the insured took his own life, then the plaintiff would be entitled to recover. It seems quite evident that the court had the correct principle in mind and that the inconsistency in the instructions was inadvertent.

In the *Vicars* case the court instructed the jury that the presumption against suicide entitled the plaintiff to recover unless there was evidence that the insured came to his death

by suicide. The court, however, appears to recognize that primarily the burden is upon the plaintiff to allege and prove that the death was not suicidal, but that having proven that the death was occasioned by a pistol wound, a presumption against suicide and crime then arose sufficient to make out a *prima facie* case by eliminating two of three possible causes of death.

In a few isolated and ill-considered cases (in so far as this point is involved), the courts seem to have failed to distinguish between policies of life and accident insurance and have held that the burden is upon a defendant accident company to show that the death was due to suicide. We believe, however, that these opinions do not express the mature judgment of these courts, and in all of the cases referred to the courts appear not to have had called to their attention the authorities cited to our Proposition No. 17. See

Standard Life & Acc. Ins. Co. v. *Thornton*, 1900, 100 Fed., 582.

Fid. & Cas. Co. v. *Freeman*, 1901, 109 Fed., 847.

Lampkin v. *Travelers Ins. Co.*, 1898, 11 Colo. Apps., 249; 52 Pac., 1040.

Jones v. *U. S. Mut. Acc. Assn.*, 1894, 92 Ia., 652; 61 N. W., 485.

Connell v. *Iowa State Trav. Men's Assn.*, 1908, 139 Ia., 444; 116 N. W., 820.

Travelers Ins. Co. v. *Nicklas*, 1898, 88 Md., 470; 41 Atl., 906.

CHAPTER V.

Classification and Discussion of Authorities on the Question as to When an Injury May Be Considered as the Sole Cause of Death.

We have already pointed out in the opening chapter of this brief that there is no liability under the usual insuring clause of a modern accident policy, until the claimant has established not only that the insured has received an injury effected through external, violent and accidental means, but also that an injury so effected *has been the sole cause of death or disabilty.*

In their effort to confine their liability to cases where the injury is the sole cause of death, the companies have made use of many qualifying adjectives and phrases and have provided that the injuries must be "the sole cause of death"; must cause death "independent of any other cause"; must be the "sole and exclusive cause of death", etc. For further illustrations see the insuring clauses quoted on page 4.

It would seem clear that when a company has stipulated in its policy, in substance, that it is not to be liable unless death results solely and independently of all other causes from a bodily injury, it has stated as explicitly and unequivocally as is possible, that there is to be no liability when some cause other than the injury is a contributing factor in bringing about death. In other words, under a policy restricting liability as clearly as is unquestionably done in the foregoing illustrations, it would seem pure redundancy to say more. As there is to be no liability unless the injury is the sole cause, the direct cause and the cause independent of every other cause, it follows as a logical and absolutely unescapable conclusion, that there can be no liability where a disease or bodily defect or infirmity, existing at the time the injury is received, contributes to bring about death. If a disease or bodily defect, existing at the time an injury is received, co-operates with the injury in bringing about death, the injury is certainly not the sole cause of death, nor is it the cause independent of every other cause.

The companies, however, appear to have considered it necessary, after having in the insuring clause promised to pay only for death brought about solely and independently of all other causes by an injury, to add another proviso to the effect that there shall be no liability when the death is contrib-

uted to by any disease, defect or bodily infirmity. After having once stated a proposition clearly, explicitly and unequivocally, there certainly can be no necessity for again stating it in another way. This is, however, exactly what the companies have done very frequently.

Upon reviewing the reported cases we find that up until some ten years ago the great majority of policies construed contained this surplusage. For illustration: in what we have termed the redundant clause the companies have provided that the insurance shall not cover death "resulting wholly or partly, directly or indirectly, in consequence of any disease"; "resulting directly or indirectly from bodily or mental infirmity or disease in any form, proximate or contributory, as a primary, secondary or final cause of death," etc., etc. It would serve no good purpose to lengthen this brief by further illustrations.

It must be remembered that we are not now discussing or considering cases where the injury is brought about by a disease. We have already shown that an accident company, in order to protect itself from liability where death is caused by an injury, which injury is brought about by disease, as, for instance, where an insured overcome by disease falls in front of an approaching train, must stipulate, in substance, that there is to be no liability where the injury is occasioned wholly or partly, directly or indirectly, by disease. We have covered this question fully in the discussion appearing under Propositions 5 and 6. We are now only concerned with the question as to when an injury, effected in a manner covered by the policy, may be regarded as the sole cause of death.

Naturally the courts which have construed policies containing the redundant clause referred to above have commented and relied upon same in their decisions. This fact has given rise to a somewhat prevalent belief that the redundant clause is necessary. A few courts which have become notorious for their brazen proclivity to disregard the plain terms of an insurance contract and seize upon any pretext to hold an insurance company liable, have found it convenient, in construing policies from which the redundant clause has been omitted, to distinguish other decisions, laying down correct principles, on the theory that those principles only apply when the policy contains the surplusage. In so doing they have purposely, or otherwise, refrained from giving effect to the plain words of

insuring clauses providing, in substance, that there is to be no liability unless the injury is the sole cause of death independent of every other cause. It is comforting to note, however, that other courts, mindful of the great underlying principles of the law which they are sworn to enforce, and unmoved by popular clamor, have construed these contracts according to their evident meaning and have pointed out that their effect is precisely the same whether the redundant clause is present or not.

It may be stated, therefore, as a general proposition, that there is no liability under the usual form of accident policy when the insured, at the time he receives an injury, is suffering from a disease, bodily defect or infirmity which co-operates with the injury to bring about death. This statement applies even though the disease or bodily infirmity would not have brought about death except for the injury, although in a few cases, where the courts have arrived at correct conclusions, they have made *obiter* statements seeming to indicate that unless the disease is potentially fatal, the company is liable. If the accident would not have caused death except for the disease, but the insured dies because the injury aggravates the effects of the disease, or the disease aggravates the effects of the injury, there is no liability.

The courts in a few cases have attempted to distinguish between an existing disease and a mere susceptibility to disease. A clear majority of those courts which have considered this question have held that if there is no disease actually existing at the time the injury is received, but the insured by reason of prior attacks of disease, from which he has fully recovered, is peculiarly susceptible to a recurrence, and, because of that susceptibility, the injury brings about a recurrence of such disease, and the two together cause death, the company is liable.

Even where the insured is suffering from disease at the time he receives an injury the company is liable, if that injury is sufficient to, and actually does, bring about death entirely independent of the disease. Thus if an insured, suffering from heart disease, is struck by lightning and killed, the company is liable. So also is it where the insured, even though suffering from all the bodily ills known to medical science, accidentally falls in front of a train and is cut to pieces.

If the injury causes a disease which in turn causes death,

the courts have uniformly and correctly held that the injury is the sole cause of death and that the company is liable.

In determining the question of liability where a disease is a factor in bringing about death, it must be borne in mind that it is essential to determine whether the disease was present at the time of the injury, or ensued subsequent to the injury as a necessary consequence thereof. For illustration: if an insured, suffering with diabetes, receives an accidental cut or scratch and, as a consequence of the existing diabetes, infection and death follow, there is no liability. If an insured slips and falls, thus receiving an injury through accidental means, which would not be fatal except for some abnormal or diseased condition, but is at the time suffering from hardening of the arteries or other disease or bodily defect, which contributes to bring about death, the company is not liable. On the other hand, if an insured in ordinarily good health accidentally cuts his finger and blood poisoning ensues, causing death, or if he accidentally falls and receives a violent blow on the chest, bringing about a fatal attack of traumatic pneumonia, the company is liable.

Even though the insured has received an injury through accidental means, causing disability, there is no liability if, subsequent to the happening of the injury, the insured contracts an independent disease with which the injury has no causal connection, and such disease brings about death.

A nice question is presented in connection with this kind of a case when it appears that the insured, subsequent to receiving the injury, has acquired an independent disease of the character just mentioned, but the evidence indicates that he would not have succumbed to the disease except for lowered vitality and decreased resistive power consequent upon the injury. There is some conflict among the decisions on this question. The preponderance of authority seems to sustain the proposition that, even under such circumstances, there is no liability unless the disease is actually traumatic in its origin. For example, there is no liability where a man, in a debilitated condition because of an injury, acquires smallpox or pneumonia and, because of his debilitated condition, succumbs to such a disease.

Unfortunately the companies are themselves largely responsible for a confusing and hybrid doctrine which has crept into the law applicable in this class of cases, and which we will, for lack of a better term, refer to as the doctrine of proximate

cause. If in considering the meaning of the word "proximate" the courts could entirely divorce themselves from the principles of law applicable in personal injury cases the situation would be different. As a matter of fact the majority of cases which are presented to Appellate Courts for determination involve controversies over alleged liability for negligence. One of the most confusing and involved doctrines arising in this class of cases is that generally known as the doctrine of proximate cause. It is one of the many propositions which cannot, because of its infinite variety and multiple possibilities, be accurately stated in general terms. The courts are, however, everywhere saturated with different and irreconcilable ideas as to when negligence may be considered as the "proximate cause" of an injury.

The companies have frequently provided in their policies that there is to be no liability unless the injury is the "proximate cause" of the death or unless it is the "sole and proximate cause," etc. In construing such policies the courts, in the majority of instances, seem to have appreciated that negligence cases, involving the question of proximate cause, are not altogether applicable. They have, however, consciously or unconsciously, been largely influenced by their preconceived notions of what a proximate cause is, derived from their familiarity with negligence cases. As a result a very abstruse doctrine of negligence law has been injected into the law of accident insurance, giving rise to endless confusion.

It is the habit of some courts to look upon all accident policies as *sui generis*. They seem totally unable to comprehend that under a given state of facts there may be liability under one policy and no liability under another. Just because one court, in its consideration of a policy providing that the company is to be liable if the injury is the "proximate cause" of death, has been obliged to comment upon the word "proximate" and to construe it, and in so doing has naturally relied upon negligence cases involving the doctrine of proximate cause, other courts, when called upon to consider other policies, containing different nomenclature, and from which the companies have carefully omitted the word "proximate," proceed to say that the company is liable if the injury is the proximate cause of death, and to rely upon negligence cases in determining that question. Happily the majority of the companies have now realized their mistake. It is also cheering to note that a few courts have recently "seen the light."

Even now, however, many of the companies are using the objectionable phraseology, and the courts in fully seventy-five per cent of the reported decisions, pertinent in this connection, have discussed the meaning of the word "proximate" and have repeatedly used it in conveying their ideas as to the principles of law applicable, irrespective of whether the policies provided to pay where the injury was the proximate cause of death or specifically limited liability to cases where the injury should be the sole cause.

In most of these cases the conclusions of the courts are correct and also, in many instances, their use of the word "proximate" is justified because of its presence in the policies. When, however, an attempt is made to rely upon the doctrine of proximate cause as applied in negligence cases the gates are opened wide for infinite conjecture and misunderstanding. For this reason the decisions of those courts which have been warranted in using the term, and those which have used it inadvisedly, have been misunderstood and misconstrued.

We venture to hope that some time, in the not far distant future, the companies will cease the use of this decidedly objectionable phraseology, and that eventually, by painstaking and careful effort, the attorneys representing them will be able to eradicate the doctrine of proximate cause as it is applied in negligence law from the law of personal accident insurance

We shall now proceed to a consideration of the decisions.

Proposition No. 18.

Where the insured at the time he receives an injury is suffering from disease, bodily defect or infirmity which, acting with the injury as a contributing factor, brings about death, or when such existing disease, defect or infirmity aggravates the effect of the injury, or the injury aggravates the effects of the disease, and both, acting together, cause death, the injury is not the sole cause of death and there is no liability.

U. S. Mut. Acc. Assn. v. *Barry,* 1889, 9 Sup. Ct. Rep., 755; 131 U. S., 100, affirming *Barry* v. *U. S. Mut. Acc. Assn.,* 1885, 23 Fed., 712.

Nat'l Mas. Acc. Assn. v. *Shryock,* 1896, 73 Fed. Rep., 774.

Travelers Ins. Co. v. *Selden,* 1897, 78 Fed., 285.

Com. Trav. Mut. Acc. Assn. v. *Fulton,* 1897, 79 Fed., 423. (See same case, 2nd appeal, 1899, 93 Fed., 621, where the court held that under the evidence at the second trial the case was for the jury.)

Hubbard v. *Mut. Acc. Assn.,* 1897, 98 Fed., 930.

Hubbard v. *Travelers Ins. Co.,* 1899, 98 Fed., 932.

Nat'l Assn. of Ry. Post. Clerks v. *Scott,* 1907, 155 Fed., 92.

Ill. Com. Men's Assn. v. *Parks,* 1910, 179 Fed., 794.

Stanton v. *Travelers Ins. Co.,* 1910, 83 Conn., 708; 78 Atl., 317.

Maryland Cas. v. *Morrow,* 1914, 213 Fed., 599.

Preferred Acc. v. *Patterson,* 1914, 213 Fed., 595.

Stokely v. *F. & C.,* 1915, 193 Ala., 90; 69 So., 64.

Moore v. *Ill. Com. Men's Assn.,* 1911, 166 Ill. App., 38.

Crandall v. *Continental Casualty Co.,* 1913, 179 Ill. App., 330.

Robison v. *U. S. H. & A.,* 1915, 192 Ill. App., 475.

Sharpe v. *Com. Trav. Mut. Acc. Assn.,* 1894, 139 Ind., 92; 37 N. E., 353.

Binder v. *National Mas. Acc. Assn.,* 1905, 127 Ia., 25; 102 N. W., 190.

Pac. Mut. Life Ins. Co. v. *Despain,* 1908, 77 Kan., 654; 95 Pac., 580.

Stull v. *U. S. H. & A. Ins. Co.,* Ky., 1909, 115 S. W., 234.

Ætna Life Ins. Co. v. *Bethel,* 1910, 140 Ky., 609; 131 S. W., 523.

Thomas v. *Fid. & Cas. Co.,* 1907, 106 Md., 299; 67 Atl., 259.

Jiroch v. *Travelers Ins. Co.,* 1906, 145 Mich., 375; 108 N. W., 728.

White v. *Standard Life & Acc. Ins. Co.,* 1905, 95 Minn., 77; 103 N. W., 735-884.

Ward v. *Ætna Life Ins. Co.,* 1908, 82 Neb., 499; 118 N. W., 70; 2nd appeal, 1909, 85 Neb., 471; 123 N. W., 456.

Penn v. *Standard Life & Acc. Ins. Co.,* 1912, 158 N. C., 29; 73 S. E., 99; on rehearing, 76 S. E., 262.

Ætna Life Ins. Co. v. *Dorney,* 1903, 68 Ohio State, 151; 67 N. E., 254.

Western Indem. v. *MacKechnie,* 1916, Texas; 185 S. W., 615.

Continental Casualty Co. v. *Peltier,* 1905, 104 Va., 222; 51 S. E., 209.

In all of the foregoing decisions, with the exception of the *Barry* case, the second decision of the *Fulton* case, the *Jiroch* and *Patterson* cases, the court's holding was in favor of the companies. In the four decisions just mentioned, it was held that the case was for the jury, under proper instructions. This list has been carefully selected and fully sustains the proposition to which it is cited. We believe it contains, from a company standpoint, the best and most pertinent authorities in support of this proposition.

In many of these cases the policy construed contained a proviso against liability for death contributed to in any way by disease, which we have heretofore referred to as the redundant clause. Inasmuch as, in our opinion, for reasons already given in full, the extent of liability is precisely the same whether this clause is present or not, providing of course that the insuring clause is in the usual form, we have, in compiling the foregoing list, made no attempt to distinguish the cases in reference to that feature. We shall subsequently discuss the authorities sustaining what we consider to be the self-evident proposition that the liability, in so far as questions now under discussion are concerned, is exactly the same under both policy forms.

In many cases the decisions are adverse to the companies, usually because there was evidence under which the court or jury was justified in finding that the injury was the sole cause of death, independent of any pre-existing disease, defect or bodily infirmity. In most of these cases, however, the courts held, either directly or by implication, that there would have been no liability if a disease, defect or bodily infirmity, existing at the time the injury was received, was one of the contributing factors in bringing about death. In other words, such cases, while decided adversely to the companies, for the reasons just mentioned, sustain Proposition No. 18. We call attention, however, to the fact that in some of them the courts laid down other propositions of law, in conflict with the general principles discussed in the preceding chapters of this brief dealing with what we have treated as the first branch of the insuring clause. All such cases, in so far as they pertain to the first branch of the insuring clause, have been discussed,

classified and distinguished in preceding chapters. We refer to the following:

McCarthy v. *Travelers Ins. Co.*, 1878, 8 Bissell, 362; Fed. Case, No. 8682.
Western Com. Trav. v. *Smith*, 1898, 85 Fed., 401.
New Amsterdam Cas. Co. v. *Shields*, 1907, 155 Fed., 54.
Central Acc. Ins. Co. v. *Rembe*, 1909, 220 Ill., 151; 77 N. E., 123.
Strehlow v. *Ætna Life*, 1913, 183 Ill. App., 50.
Ballance v. *Woodmen's Cas. Co.*, 1913, 183 Ill. App., 625.
Delaney v. *Modern Acc. Club*, 1903, 121 Ia., 528; 97 N. W., 91.
Morrow v. *Nat'l Mas. Acc. Assn.*, 1904, 125 Ia., 633; 101 N. W., 468.
Vernon v. *Ia. State Trav. Men's Assn.*, Ia., 1912, 138 N. W., 696.
Continental Casualty Co. v. *Hunt*, 1906, 28 Ky. L. Rep., 1006; 90 S. W., 1056.
Gen. Acc. v. *Richardson*, 1914, 157 Ky., 503; 163 S. W., 482.
Skinner v. *Com'l Travelers*, 1916, Mich., 157 N. W., 105.
Thompson v. *Loyal Protective Assn.*, 1911, 167 Mich., 31; 132 N. W., 554.
Ludwig v. *Pref. Acc. Ins. Co.*, 1911, 113 Minn., 510; 130 N. W., 5.
Ashelby v. *Travelers*, 1915, 131 Minn., 144; 154 N. W., 946.
Rodney v. *Travelers Ins. Co.*, 1886, 3 N. M., 316; 9 Pac. Rep., 348.
Rheinheimer v. *Ætna Life Ins. Co.*, 1907, 77 Ohio State, 360; 83 N. E., 491.
Order United Com. Trav. of Am. v. *Roth*, 1913, Texas, 159 S. W., 176.
Cary v. *Preferred Acc. Ins. Co.*, 1906, 127 Wis., 67; 106 N. W., 1055.

The following cases are also of interest in connection with Proposition No. 18:

Tennant v. *Travelers Ins. Co.*, 1887, 31 Fed., 322.

Westmoreland v. *Pref. Acc. Ins. Co.*, 1896, 75 Fed., 244.

Maryland Casualty Company v. *Glass*, 1902, 29 Tex. Civ. App., 159; 67 S. W., 1062.

The *Tennant* case has already been fully discussed on page 74.

In the *Westmoreland* case the policy, in addition to the usual insuring clause, contained a proviso that there should be no liability for injury resulting from "anything accidentally or otherwise taken, administered, absorbed or inhaled," or resulting "directly or indirectly, wholly or in part from . . . medical or surgical treatment." It was alleged in the declaration that in order to perform a minor operation a physician had administered chloroform in proper quantity to the insured, and that from it and an unknown cause combined, he suffocated and died. The defendant demurred to the declaration. The court sustained the demurrer, holding that under the allegation of the declaration the result of the chloroform, even if effected through accidental means, was evidently not the sole cause of death, and that the company would not be liable for death resulting from a combination of an unknown cause and a known cause, even if the known cause acting alone would have been covered by the policy. It also said that aside from this there could be no recovery because of the excepting clause quoted above, and concluded that there was no liability, either under the insuring clause taken alone or under the exceptions referred to.

The *Glass* case is a freak one, in that the policy was so drawn that it covered death resulting, independently of all other causes, from the non-accidental administration of an anaesthetic. The court said that if the insured was afflicted with a disease which caused or directly contributed to his death the company would not be liable, although the chloroform might have been a cause concurring in producing death; that if the anaesthetic would not have caused his death if it had not been for the disease, but the insured died because the chloroform aggravated the effects of the disease, or the disease aggravated the effects of the drug, the company would not be liable. After pointing out that under the undisputed evidence it appeared that the insured was suffering from the rupture of a diseased appendix, that the poison was diffused throughout his system and that the chloroform was not the

sole cause of death, it concluded that the trial court had erred in not directing a verdict for the defendant.

In the case of

Fishblate et al. v. *Fid. & Cas. Co.,* 1906, 140 N. C., 589; 53 S. E., 354,

the court made an *obiter* statement indicating that the company would be liable even in a case where the insured at the time the injury was received was suffering from a disease which contributed to bring about death, unless the disease was of such a character that it would have brought about death independent of the injury.

This erroneous statement is cleared up by the Supreme Court of North Carolina in the recent case of

Penn v. *Standard Life & Acc. Ins. Co.,* 1912, 158 N. C., 29; 73 S. E., 99; on rehearing, 76 S. E., 262,

where it is pointed out that in this class of cases the liability of the company is not to be determined with reference to whether or not the existing disease was potentially fatal, and that there is no liability if such an existing disease contributes with the injury to bring about death, irrespective of whether or not the disease would have occasioned death had it not been for the injury.

See, also,

Crandall v. *Continental Casualty Company,* 1913, 179 Ill. App., 330,

to the same effect.

An interesting case which has some bearing on the question now under discussion is

U. S. H. & A. Ins. Co. v. *Bennett's Admr.,* 1907, 32 Ky. L. R., 235; 105 S. W., 433.

In that case the policy provided to pay indemnity if septicaemia should "independently of all other causes result in the death of the assured." This is a peculiar case, in that it involves the construction of an accident policy which by its terms covered death occasioned by a disease, independently of all other causes. The evidence showed that the septicaemia was caused by a sloughing of hemorrhoids, complicated by acute dysentery. It appeared, however, that both of these troubles were under control and that the insured would, without doubt, have entirely recovered his health except for the

septicaemia. The company contended that the death was not caused by septicaemia "independently of all other causes." The court said that septicaemia never attacks a person in perfect health, that some wound or disease is always the primary cause of it, and that if it should construe the policy as the defendant claimed it should be construed there could never be a case of liability under this particular provision. It concluded that under the contract before it the company was liable unless the disease which brought about the septicaemia would have caused death, even if the septicaemia had not resulted.

A few cases announce doctrines not in accord with Proposition No. 18. See

Fid. & Cas. Co. v. *Meyer, Ark.*, 1912, 152 S. W., 995.
Maloney v. *Maryland Cas. Co.*, 1914, 113 Ark., 174; 167 S. W., 845.
Hall v. *Genl. Acc.*, 1915, 16 Ga. Apps., 66; 85 S. E., 600.
Continental Casualty Co. v. *Lloyd*, 1905, 165 Ind., 52; 73 N. E., 824.
Fetter et al. v. *Fid. & Cas. Co.*, 1903, 174 Mo., 256; 73 S. W., 592.
Driskell v. *U. S. H. & A. Ins. Co.*, 1906, 117 Mo. App., 362; 93 S. W., 880.
Baehr v. *Union Cas. Co. et al.*, 1908, 133 Mo. App., 541; 113 S. W., 689.
Beile v. *Trav. Pro. Assn. of Amer.*, 1911, 155 Mo. App., 629; 135 S. W., 497.
Hooper v. *Standard Life & Acc. Ins. Co.*, 1912, 166 Mo. App., 209; 148 S. W., 116.
Goodes v. *Order United Com. Trav.*, 1913, 174 Mo. App., 330; 156 S. W., 995.

In the *Meyer* case the court had occasion to consider a policy insuring against death "resulting directly, independently and exclusively of all other causes" from injuries. The evidence showed that the insured was standing in a wagon and was thrown backward by a sudden start of the horse, striking his back on the iron handhold of the wagon seat. Prior to the accident the insured had appeared to be in perfect health, but a *post mortem* disclosed a tumorous or cancerous growth on the head of the pancreas. There was evidence that this growth was of at least several months' standing, and there

was also evidence that it might have been caused by the blow. Under these circumstances the court was of course justified in allowing the case to go to the jury. The trial court, however, instructed the jury that if the bruise was received in the manner claimed by the plaintiff, even though the insured was afflicted with a latent or dormant cancerous growth which was affected, excited and aroused to rapid growth by the injury, causing erosion of the blood vessels and consequent death independently and exclusively of all other direct causes, the plaintiff could recover. The trial court further instructed that if the insured would not have died at the time he did had it not been for the accident, and though death from the cancer might have resulted, if it would have been deferred until a later period, the jury should find for the plaintiff.

The Supreme Court approved this instruction, relying upon the *Fetter, Driskell* and *Beile* cases. It distinguished the *Shryock* case in the 73rd Federal, the *White* case in the 103rd Northwestern, the *Fulton* case in the 79th Federal, and the *Stanton* case in the 78th Atlantic (all of which cases have just been discussed in connection with Proposition No. 18), on the theory that the policies construed in those cases contained, in addition to the insuring clause, a special clause providing that there should be no liability if death should result wholly or in part, directly or indirectly, from disease or bodily infirmity. We shall endeavor to demonstrate in connection with discussion of Proposition No 19 that this additional clause is purely a redundancy and that the legal effect of a policy is precisely the same whether it is present or not. The Supreme Court of Arkansas evidently did not take the trouble to read the *Stanton* case, since, as far as the opinion in that case shows, the policy did not contain the redundant clause, relied upon by the Arkansas court to distinguish the authorities laying down correct propositions of law from the case which was before it.

The court concluded that an accident company is liable where the injury aggravates the disease and hastens death so as to cause it to occur at an earlier period than it would have occurred, except for the injury, and said that under such circumstances the accident must be considered as the direct, independent and exclusive cause of death. It seems to have believed that its conclusion in this connection is supported by the decision in the *Parks* case, 179 Federal, 794. We shall refer to the *Parks* case in connection with the *Lloyd* case and

also in our discussion of Proposition No. 22, and shall point out that it does not sustain the statement in support of which it is cited in the *Meyer* case, since the Federal court left the question open without attempting to pass upon it. The Arkansas court also relied upon the case of *Freeman* v. *Merc. Mut. Acc. Assn.*, Sup. Ct. Mass., 1892, 156 Mass., 351; 30 N. E. Rep., 1013, without at all appreciating the true effect of that decision, as will be explained in our discussion of the *Fetter* case and of Proposition No. 22.

In the *Maloney* case, also decided by the Supreme Court of Arkansas, two years after the decision in the *Meyer* case, it appears that the insured died from blood poisoning. There was a conflict in the evidence as to whether this blood poisoning was the result of a bed-sore or the result of being accidentally struck by a bed-pan. The case was properly permitted to go to the jury. The trial court gave a correct instruction to the effect that if the injury was not the sole cause of death there was no liability. The Supreme Court of Arkansas in referring to this instruction cited the *Meyer* case with approval although it is evident that it did not fully grasp the point involved.

In the Hall case the evidence showed that the insured, a very heavy man over seventy years of age, who had been suffering for several years from Bright's disease, slipped on a wet pavement and sustained a severe fall. The testimony was conclusive to the effect that the pre-existing Bright's disease was, at least, one of the causes of death, although the evidence further showed that the insured probably would not have died at the precise time that he did except for the injury. He would, however, have died from the disease finally. The trial court took the case from the jury. The Georgia Court of Appeals, in a long opinion wherein most of the cases listed on page 91 are cited, concludes that the case should have been submitted to the jury; and further holds to the effect that if the accident was the proximate, active and efficient cause of death, the company would be liable, notwithstanding the fact that the pre-existing disease was a contributing factor.

In the *Lloyd* case the court had before it a policy which provided to pay where injuries should "solely and independently of all other causes necessarily result in death." The opinion is a long one and it is not possible to here review the evidence. It appears clearly, however, that the undisputed

evidence showed that a brain tumor, existing prior to the date of the injury, had at least something to do with the rupture of an artery in the brain, which caused the death. The court fell into the the common error of believing that the doctrine of proximate cause as applied in negligence cases was also applicable to the construction of the insuring clause before it.

The opinion is involved, contradictory and illogical. The court after floundering about at great length among the mazes and perplexities arising in connection with the so-called doctrine of proximate cause, concludes that where two or more causes contribute to an injury, and there is a doubt as to which of the contributing causes is the efficient dominating and proximate cause, the question is to be submitted to the jury. In support of this statement it cites, among others, a personal injury case, involving an action for negligence against a railroad company. It also makes many other vague and general statements which it is unnecessary to take up space here by reciting. The court appears to have given no consideration whatever to the plain terms of the insuring clause, and to have proceeded upon the hypotheses that the case was to be determined without any regard to the phraseology of the contract and in accordance with the doctrine of proximate cause as applied in negligence cases. The authorities relied upon by the Indiana court, with possibly one or two exceptions, do not sustain its hazy, indefinite and very general statements.

In the recent case of *Crandall* v. *Continental Casualty Company,* decided in March, 1913, by the Appellate Court of Illinois, reported 179 Ill. App., 330. Judge Carnes, in an elaborate and exceedingly able opinion, considered practically all of the leading cases on both sides of the question here involved, including the *Lloyd* case, saying that the court seems to have assumed in that case that the phrases "sole cause of death" and "efficient, dominant, proximate cause of death," have the same meaning. He then proceeds to point out that the authorities relied upon by the Indiana court do not support its conclusions and concludes that the same are contrary to the great weight of authority.

In the case of *Ill. Com. Men's Ass'n* v. *Parks,* decided by the U. S. Cir. Ct. of Appeals in April, 1910, reported 179 Fed., 794, Judge Seaman, who wrote the opinion, referred to the *Lloyd* case as laying down the proposition that a policy limiting liability to death resulting necessarily, solely and inde-

pendently of all other causes from injuries, is to be construed in the same manner as a policy which agrees to pay indemnity for death of which an injury is the proximate cause. He implied that this holding is rather questionable, but concluded that it was not necessary to determine that question, since the policy before him contained a further provision for non-liability where the death resulted wholly or partly, directly or indirectly from disease, saying that the ultimate issue of liability under such a contract is not whether the injury is the proximate cause of death, but whether it is the efficient cause, without the intervention of any pre-existing disease or bodily infirmity as a co-operative cause. We shall subsequently attempt to demonstrate that this proposition is equally applicable when the policy does not contain the redundant clause relied upon in the *Parks* case.

In the *Fetter* case the insured died as the result of a ruptured kidney, such injury being brought about by accidental means. An autopsy disclosed that the kidney was cancerous, but the court pointed out that there was evidence to the effect that the cancer might not have been present at the time the injury was received and might have been caused solely by the injury. Under such circumstances, of course, the trial court properly allowed the case to go to the jury to determine whether or not the death resulted from the injury, independent of all other causes. It appears that the trial court instructed the jury to find for the plaintiff, notwithstanding that the kidney was diseased at the time the rupture occurred, if the insured would not have died at the time, under the circumstances and in the manner he did die, had it not been for the rupture. The Supreme Court approved this instruction on the theory that the causes referred to in the policy must be construed to mean the proximate or direct and not the remote causes, relying principally upon the case of *Freeman* v. *Merc. Mut. Acc. Assn.*, 1892, 156 Mass., 351; 30 N. E. Rep., 1013.

This case will be discussed in detail later. At this time it is sufficient to say that the Supreme Court of Missouri, in the *Fetter* case, appears to have entirely overlooked the fact that the policy construed in the *Freeman* case stipulated that there should be no liability unless the injury should be the "proximate cause of the disability or death." The Missouri court also overlooked the fact that in the *Freeman* case the Supreme Court of Massachusetts approved an instruction of the trial court to the effect that, even under such

a policy, there could be no recovery if the insured was suffering with peritonitis at the time he received the injury and such disease was aggravated and made fatal by the fall. The *Fetter* case is distinguished on the theory that there was evidence that the injury was the sole cause of death, sufficient to take the case to the jury, in the following cases:

Shanberg v. *Fid. & Cas. Co.*, 1905, 158 Fed., 1; affirming 143 Fed., 651.

Crandall v. *Continental Casualty Co.*, 1913, 179 Ill. App., 330.

Johnson v. *Continental Casualty Co.*, 1907, 122 Mo. App., 369; 99 S. W., 473.

Penn v. *Standard Life & Acc. Ins. Co.*, 1912, 158 N. C., 29; 73 S. E., 99; on rehearing, 76 S. E., 262.

In the *Crandall* and *Penn* cases the courts specifically disapprove of all that portion of the opinion in the *Fetter* case which is contrary to Proposition No. 18.

The *Driskell* case went to the Kansas City Court of Appeals on demurrer to a petition which was clearly sufficient. After deciding the only point which was before it, the court, without any apparent reason for so doing, went on to say, by way of *dicta,* that where the policy provides that there shall be no liability unless the death shall "result solely from such injuries," it must be construed to mean that the company is liable if the injury stands out as the predominant factor, or the active, efficient cause setting in motion agencies that result in death; that under such circumstances the injury should be considered as the sole and proximate cause of death, and the fact that physical infirmity may be a necessary condition to the result, does not deprive the injury of its distinction as the sole producing cause. In support of its gratuitous and unnecessary remarks in this connection, the court relies upon the *Freeman* case without at all appreciating the true effect of that decision, as just pointed out in our discussion of the *Fetter* case.

In the *Baehr* case the Kansas City Court of Appeals, relying upon the *Driskell* case, held that if an insured is injured prior to the time when the policy goes into force, and receives another injury after that time, and would not have died but for the last injury, the beneficiary may recover, even though the last injury would not have been fatal except for the first.

In the *Beile* case the court considered a policy which, as

far as the opinion shows, insured against "death by accident," with a further proviso that there should be no liability for death "caused wholly or in part by any bodily . . . infirmity or disease." It appeared that the insured voluntarily permitted chloroform to be administered to him for a slight but painful cutting operation and that, after a few drops had fallen upon the mask, he collapsed and died. We have already considered that case in so far as it bears upon the question as to when an injury is effected through accidental means. An autopsy revealed a diseased condition of the heart and other vital organs. The court relied upon the *Fetter* and *Driskell* cases in support of its conclusion that the plaintiff was entitled to recover if the chloroform and not the bodily infirmity was the proximate cause of death.

The opinion in the *Hooper* case does not show what the insuring clause was. The court without citing any authority or giving any reason, laid down at the outset of the opinion the proposition that, notwithstanding the insured was fatally diseased in heart and brain and notwithstanding his death was from apoplexy, if he accidentally fell and ruptured a blood vessel, causing an apoplectic stroke, his death would be counted as accidental. It appeared that the trial court instructed the jury that there would be no liability if the insured was stricken with apoplexy while sitting in his seat or while attempting to rise therefrom, if such apoplexy caused death. The Court of Appeals said that this instruction was incorrect and should be modified by inserting the proviso that the stroke of apoplexy must have occurred before the fall. Inasmuch as the court does not indicate clearly upon just what theory it proceeded, and cites no pertinent authorities, and as the insuring clause does not appear, it is hard to classify this decision. It seems safe to say that it is not in accord with correct principles.

In the *Goodes* case, 1913, 156 S. W., 995, the court, after discussing authorities on both sides of the Proposition now under consideration, refused to adhere to what we believe to be correct principles, relying in support of its conclusions upon the *Fetter, Driskell, Beile* and *Hooper* cases. It must, therefore, be conceded that both the Kansas City and St. Louis Courts of Appeals are squarely on record in announcing a doctrine directly inconsistent with Proposition No. 18.

In this connection, however, we call attention to the decision of the St. Louis Court of Appeals in the case of *Wright* v.

Order of United Commercial Travelers, 1915, 174 S. W., 833, and to the decision of the Kansas City Court of Appeals in the case of *Greenlee* v. *Kansas City Casualty Company,* 1916, 182 S. W., 138. In the *Wright* case the insured dropped dead while attempting to saw a board on a hot day while in a cramped position. No autopsy was held. Plaintiff introduced expert testimony to the effect that death was due to the rupture of a blood vessel caused by the unusual exertion. The court held that the Missouri cases upon which we have just commented at length had no application, since in the case before it there was no autopsy and no evidence that the artery was in fact ruptured; hence, it was held that to find for the plaintiff it was necessary to base a presumption upon a presumption, and judgment against the company was reversed. In the *Greenlee* case it appeared that the insured slipped and fell. The defendant contended that the fall was due to the disease of meningitis. The plaintiff contended that the fall was *not* so occasioned, and that if the insured had meningitis at all it was brought about as the result of the fall. The Court of Appeals approved instruction of the trial court to the effect that there was no liability unless the death was the direct result of the fall and that there was further no liability if the death was the direct result of meningitis. The Court of Appeals also approved instructions of the trial court to the effect that if the fall was occasioned by the disease of meningitis, there was no liability. The previous Missouri decisions are, however, cited with apparent approval.

See, also, in this connection,

Modern Woodmen Acc. Assn. v. *Shryock,* 1898, 54 Neb., 250; 74 N. W., 607.

Moon v. *Order United Com. Trav.,* 1914, 96 Neb., 65; 146 N. W., 1037.

The *Shryock* case is a sister case to *Nat'l Mas. Acc. Assn.* v. *Shryock,* 1896, 73 Fed., 774, cited in support of Proposition No. 18. It appeared that the insured after his death was found to have had fatty degeneration of the heart, but it would seem from the opinion that there was some evidence that the injury was sufficient to cause death, independent of the diseased condition, although the preponderating weight of evidence was to the contrary. The Nebraska court proceeded to quote at great length from the opinion of Judge Sanborn in the Federal case, wherein he said that there could be no re-

covery if a pre-existing disease contributed to the death, and that the company was not liable if the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident. After quoting from Judge Sanborn's opinion, the Nebraska court then quotes exhaustively from the decisions upon which he relied, and concludes by saying that an examination of those cases had failed to convince it of the correctness of the principles stated by Judge Sanborn. Inasmuch as the Nebraska court does not point out wherein the propositions laid down by Judge Sanborn were wrong and merely says that under the circumstances it was a question for the jury to determine whether the injury was the proximate cause of Shryock's death, it is difficult to determine just what the court intended to hold. It seems probable that it was confused on the question of proximate cause. Ten years later the Nebraska court got in line with correct principles. See *Ward* v. *Ætna Life Ins. Co.*, 1908, 82 Neb., 499; 118 N. W., 70; on second appeal, 85 Neb., 471; 123 N. W., 456.

It has, however, again wobbled in the recent case of *Moon* v. *Order of United Commercial Travelers*, above referred to. In that case it appeared that the insured fell and received an injury. The autopsy disclosed a diseased condition and the evidence was conflicting as to whether such disease was a contributory cause of death. Under these circumstances the case was properly submitted to the jury. The court refers to a number of decisions laying down the undisputed proposition that where a fatal disease is itself occasioned by a previous injury there is liability. The court does not refer to its previous decision in the *Ward* case, nor to any of the decisions which are applicable to the real point which it had under consideration. In other words, it appears to have been confused as to the precise point involved, and in the concluding paragraph of the opinion seems to indicate that even if there was a pre-existing disease which had something to do with the death of the insured, the company would be liable because the insured might have lived many years except for the accident, and therefore such accident was the proximate cause of death. This language is unfortunate, was entirely unnecessary and is not supported by the decisions relied upon. As the *Ward* case is not referred to it must, we think, be assumed that there was no intent to disapprove the principles laid down in that case.

Proposition No. 19.

When the insuring clause of an accident policy limits liability to death brought about by injuries "solely and independently of all other causes," or words of substantially the same meaning, it is not necessary to add a further proviso, in substance, to the effect that there shall be no liability where death results wholly or partly, directly or indirectly, from disease or bodily defect or infirmity, and the legal effect of the policy is precisely the same whether or not it contains the additional clause.

Crandall v. *Continental Casualty Co.*, 1913, 179 Ill. App., 330.

Penn v. *Standard Life & Acc. Ins. Co.*, 1912, 158 N. C., 29; 73 S. E., 99; on rehearing, 76 S. E., 262.

The *Crandall* case was decided in March, 1913, by the Appellate Court of Illinois. The decision is a very elaborate and able one, and the court exhaustively reviews the authorities on both sides of the questions under discussion in this chapter. It had before it a policy providing to pay death indemnity if the insured should receive a bodily injury which should "necessarily and solely" result in death. The policy did not contain the redundant clause heretofore referred to. The court said:

> "In considering the various cases arising on accident insurance contracts containing similar provisions, we must bear in mind that the policy under consideration here is not one with the general undertaking to answer in case of . . . death from accidental causes, with a clause excepting specific causes and thus limiting the general liability. . . . There are . . . cases where the undertaking is limited, as in this case, by its own terms as first stated, yet followed by exceptions of specified causes, that, without such express exceptions, could not have fallen within the stipulated undertaking to pay. This form of policy seems to have been quite usual in the time of the earlier cases and less common in later years. We see no difference in construction of an insurance contract where the undertaking is as first stated clearly to answer only for death from some limited cause or causes, whether it is followed by express exception of some cause not there included, or not. If the stipulation be to pay in case of death from poison,

it is immaterial whether or not it be followed by an express provision that the insurer will not be liable in case of death from some other specified cause. The plaintiff must aver and prove death from poison. Yet, in discussing cases containing such useless exceptions, the courts have often naturally referred to them as express provisions that the insurer would not be liable in such event. The legal effect of the policy is the same whether the redundant provision is present or not."

The *Penn* case was first decided by the Supreme Court of North Carolina in December, 1911. That decision is reported in 158 N. C., 29; 73 S. E., 99. Another opinion was subsequently written in November, 1912, on petition for rehearing. The opinion last referred to appears in 160 N. C., 399; 76 S. E., 262. In the first opinion, on page 100 of the 73rd Southeastern, and in the second opinion, on page 263 of the 76th Southeastern, the court referred to the case of *Carr* v. *Pacific Mutual Life Ins. Co.*, 100 Mo. App., 602; 75 S. W., 180; as authority for the statement that the question of proximate and immediate cause is not raised under the conditions of a policy which in terms excludes disease or bodily infirmity, and further said that such conditions "could have no more force than the general provision, 'independent of all other causes'."

The *Crandall* and the *Penn* cases seem to be the only ones where the courts have specifically held that the legal effect of the policy is precisely the same whether the redundant clause is present or not. The opinion of Judge Carnes in the *Crandall* case, and the opinions of Judge Walker in the original decision and on petition for rehearing, in the *Penn* case, contain unquestionably the best and most carefully considered statements of the law applicable in this class of cases. Both of these judges evidently took the time to thoroughly review the authorities, and we commend these decisions to the careful study of anyone interested in the propositions of law under discussion.

See, also,

Rheinheimer v. *Ætna Life Ins. Co.*, Ohio, 1907; 77 Ohio State, 360; 83 N. E., 491.

In that case the policy contained the usual insuring clause and in addition the redundant clause, excepting liability where death should result wholly or partly, directly or indirectly from disease. The lower court instructed the jury that there

could be no recovery unless injuries effected through accidental means caused the death solely and independently of all other causes, without referring to the redundant clause. The defendant complained that the trial court should have further instructed that there would be no liability if the death was occasioned wholly or partly, directly or indirectly, by disease, etc. The court said on page 496 of the 83rd Northeastern:

> "The court, in charges given, had stripped from the real issue some of these qualifying words which to the jury might seem mysterious, and which might even confound them, and gave their purport and meaning in clear and simple terms. For if the accident was the sole cause of death, and . . . it was so caused independently of any other cause, then it did not result partly from any other cause: . . ."

In many other cases the courts appear to have recognized that Proposition No. 19 is correct, since they have laid down the rule that there is no liability where disease, defect or infirmity, existing at the time the injury is received, contribute to the death, when the policies under consideration did not contain the redundant clause, and have relied, in support of this conclusion, upon the early cases construing policies which did contain that clause. For illustration we call attention to the following authorities fully sustaining Proposition No. 18, in all of which cases the policies construed, in so far as the opinions show, did not contain the redundant clause:

Nat'l Assn. of Ry. Post. Clerks v. *Scott,* 1907, 155 Fed., 92.

Stanton v. *Travelers Ins. Co.,* 1910, 83 Conn., 708; 78 Atl., 317.

Stull v. *U. S. H. & A.,* Ky., 1909, 115 S. W., 234.

Ætna Life Ins. Co. v. *Bethel,* 1910, 140 Ky., 609; 131 S. W., 523.

Thomas v. *Fid. & Cas. Co.,* 1907, 106 Md., 299; 67 Atl., 259.

Ward v. *Ætna Life Ins. Co.,* 1908, 82 Neb., 499; 118 N. W., 70; 2nd Appeal, 1909, 85 Neb., 471; 123 N. W., 456.

Continental Casualty Company v. *Peltier,* 1905, 104 Va., 222; 51 S. E., 209.

Proposition No. 20.

When the insured at the time he receives an injury, effected in a manner covered by the policy, is not suffering from a disease, defect or bodily infirmity, but the injury itself, entirely independent of any pre-existing cause, brings about a disease, which, in turn, causes death, the company is liable.

In the following cases the court held that the company was liable where there was evidence indicating that an injury of the character just mentioned resulted in septicaemia or blood poisoning, which in turn brought about death:

Western Com. Trav. v. *Smith,* 1898; 85 Fed., 401.

Nax v. *Travelers Ins. Co.,* 1904, 130 Fed., 985; reversed, 142 Fed., 653.

Fid. & Cas. Co. v. *Stacey's Exs.,* 1906, 143 Fed., 271; reversing same case entitled *Carroll* v. *Fid. & Cas.* Co., 137 Fed., 1012.

Herdic v. *Maryland Casualty Co.,* 1906, 146 Fed., 396; affirmed, 149 Fed., 198.

Central Acc. Ins. Co. v. *Rembe,* 1909, 220 Ill., 151; 77 N. E., 123.

U. S. H. & A. Ins. Co. v. *Harvey,* 1906, 129 Ill. App., 104.

Delaney v. *Modern Accident Club,* 1903, 121 Ia., 528; 97 N. W., 91.

Simpkins v. *Hawkeye Com. Men's Assn.,* 1910, 148 Ia., 543; 126 N. W., 192.

Caldwell v. *Iowa State Trav. Men's Assn.,* Ia., 1912, 136 N. W., 678.

Vernon v. *Iowa State Trav. Men's Assn.,* Ia., 1912, 138 N. W., 696.

Omberg v. *U. S. Mut. Acc. Assn.,* 1897, 101 Ky., 303; 40 S. W., 909.

Continental Casualty Co. v. *Matthis,* 1912, 150 Ky., 477; 150 S. W., 507.

McAuley v. *Casualty Co. of America,* 1909, 39 Mont., 185; 102 Pac., 586. (See same case first appeal 1908, 37 Mont., 256; 96 Pac., 131; where judgment against company was reversed because no evidence that injury was cause of septicaemia.)

Farner v. *Mass. Mut. Acc. Assn.,* 1907, 219 Pa., 71; 67 Atl., 927.

Martin v. *Mfrs. Acc. Indemnity Co.*, 1896, 151 N. Y., 94; 45 N. E., 377; affirming 71 Hun, 614.

Martin v. *Equitable Acc. Assn.*, 1891, 16 N. Y. Supp., 279.

Bailey v. *Interstate Casualty Co.*, 1896, 40 N. Y. Supp., 513; affirmed without opinion, 158 N. Y., 723; 53 N. E., 1123.

Rheinheimer v. *Ætna Life Ins. Co.*, 1907, 77 Ohio St., 360; 83 N. E., 491.

Cary v. *Pref. Acc. Ins. Co.*, 1906, 127 Wis., 67; 106 N. W., 1055.

French v. *Fid. & Cas. Co.*, 1908, 135 Wis., 259; 115 N. W., 869.

The following are cases where there was evidence indicating that the injury produced some disease or bodily infirmity other than blood poisoning:

McCarthy v. *Travelers Ins. Co.*, 1878, Fed. Case No. 8682, 8 Biss., 362. "Abscess on lung."

Preferred Acc. Ins. Co. v. *Fielding*, 1905, 35 Colo., 19; 83 Pac., 1013. "Burns."

Morrow v. *Nat'l Mas. Acc. Assn.*, 1904, 125 Ia., 633; 101 N. W., 468. "Endocarditis."

Strehlow v. *Ætna Life*, 1913, 183 Ill. App., 53. "Traumatic diabetes."

Franklin v. *Continental Cas. Co.*, 1913, 184 Ill. App., 259. "Hemorrhage of lungs."

Pacific Mut. Life v. *McCabe*, 1914, 157 Ky., 270; 162 S. W., 1136. "Ruptured colon."

Continental Casualty Co. v. *Colvin*, 1908, 77 Kan., 561; 95 Pac., 565. "Abscess in chest cavity."

Standard Life & Acc. Ins. Co. v. *Thomas*, 1891, 13 Ky. L. R., 593; 17 S. W., 275. "Some sort of fever."

Continental Casualty Co. v. *Hunt*, 1906, 28 Ky. L. Rep., 1006; 90 S. W., 1056. "Bright's disease."

Travelers Ins. Co. v. *Bingham*, Ky., 1907, 105 S. W., 894. "Insanity."

Fid. & Cas. Co. v. *Cooper*, 1910, 137 Ky., 544; 126 S. W., 111. "Traumatic pneumonia."

Gen. Acc., Fire & Life Assur. Corp. v. *Meredith*, 1910, 141 Ky., 92; 132 S. W., 191. "Intussusception of bowels."

Maryland Casualty Company v. *Burns,* 1912, 149 Ky., 550; 149 S. W., 867. "Hemorrhage of lungs."

Travelers Ins. Co. v. *Davies,* Ky., 1913, 153 S. W., 956. "Pancreatitis."

Gen. Acc., Fire & Life Assur. Corp. v. *Homely,* 1908, 109 Md., 93; 71 Atl., 524. "Nephritis."

Thompson v. *Loyal Protective Assn.,* 1911, 167 Mich., 31; 132 N. W., 554. "Nephritis."

Johnson v. *Continental Casualty Co.,* 1907, 122 Mo. App., 369; 99 S. W., 473. "Traumatic pneumonia or cerebral hemorrhage."

Peck v. *Equitable Acc. Assn.,* 1889, 5 N. Y. Supp., 215. "Traumatic embolism or thrombus."

Thurber v. *Com. Trav. Mut. Acc. Assn.,* 1900, 64 N. Y. Sup., 174. "Heart and lung trouble." (See same case on first appeal 52 N. Y. Sup., 1071, where the court held there was not sufficient evidence to go to the jury.)

McCullough v. *Railway Mail Assn.,* 1909, 225 Pa., 118; 73 Atl., 1007. "Blood clot on brain."

Huguenin v. *Continental Cas. Co.,* S. C., 1913, 77 S. E., 751. "Inflammation of liver."

Travelers Ins. Co. v. *Hunter,* 1902, 30 Tex. Civ. Apps., 489; 70 S. W., 798. "Rheumatism."

Ætna Life Ins. Co. v. *Griffin,* Tex., 1909, 123 S. W., 432. "Sympathetic inflammation of left eye following injury to right eye."

Armstrong v. *West Coast Life Ins. Co.,* Utah, 1912, 124 Pac., 518. "Traumatic pneumonia."

Hall v. *American Mas. Acc. Assn.,* 1893, 86 Wis., 518; 57 N. W., 366. "Concussion of brain and apoplexy."

Proposition No. 21.

Where there is evidence tending to indicate that the injury was the sole cause of death, independent of any disease, defect or infirmity, or when the insured dies from some disease and there is evidence tending to show that such disease was not existing at the time the injury was received, but was brought about solely by the injury, then the verdict of a jury against the defendant insurance company will not be disturbed on appeal. Many of the authorities heretofore cited

to Propositions 18 and 20 sustain the foregoing statement. We call attention to the following additional authorities:

Pacific Mut. Life Ins. Co. v. *Shields,* Ala., 1913, 62 Sou., 71.
McCormick v. *I. C. M. A.,* 1907, 159 Fed., 114.
Stout v. *Pac. Mut. Life Ins. Co.,* 1900, 130 Cal., 471; 62 Pac., 732.
Railway Offs. & Emps. Acc. Assn. v. *Coady,* 1889, 80 Ill. App., 563.
Coulter v. *Travelers Pro. Assn.,* 1908, 144 Ill. App., 255.
Prader v. *Nat'l Mas. Acc. Assn.,* 1895, 95 Ia., 149; 63 N. W., 601.
Brinsmaid v. *Order United Com. Trav.,* Ia., 1912, 138 N. W., 465.
Genl. Acc. v. *Richardson,* 1914, 157 Ky., 503; 163 S. W., 482.
Traiser v. *Com. Travelers,* 1909, 202 Mass., 292; 88 N. E., 901.
Rodney v. *Travelers Ins. Co.,* 1886, 3 N. Mex., 316; 9 Pac., 348.
Larkin v. *Interstate Casualty Co.,* 1899, 60 N. Y. Supp., 205.
Royal Cas. Co. v. *Nelson,* 1913 Texas, 153 S. W., 674.
Internat. Trav. Assn. v. *Bosworth,* 1913 Texas, 156 S. W., 346.
Order United Com. Trav. v. *Roth,* 1913, 159 S. W., 176.
Potter v. *Ætna Life Ins. Co.,* Wash., 1912, 128 Pac., 647.

The following cases are pertinent in this connection and particularly interesting because of the peculiar facts involved:

Travelers Ins. Co. v. *Melick,* 1894, 65 Fed., 178.
Streeter v. *Western Union Mut. Life Acc. Soc.,* 1887, 65 Mich., 199; 31 N. W., 779.
Standard Life & Acc. Ins. Co. v. *Wood,* 1911, 116 Md., 575; 82 Atl., 702.
Gardner v. *United Surety Co.,* 1910, 110 Minn., 291; 125 N. W., 264.
Collins v. *Cas. Co. of America,* 1916 Mass., 112 N. E., 634.

In the *Melick* case it appeared that the insured accidentally shot himself in the foot, bringing about tetanus, which causes

a very excruciating pain. Because of this intense pain, or while insane therefrom, the insured cut his own throat. The tetanus was sufficient to cause death, as was also the injury to the throat. The trial court charged that if the pistol wound caused tetanus, bodily pain and delirium and that, while in such delirium, the insured cut his own throat, impelled by intense agony, but unable to resist or overcome the impulse, the shot wound might be considered as the cause of death. This instruction was approved and judgment in favor of plaintiff was affirmed. This case will be discussed in more detail in connection with the question of proximate cause.

In the *Streeter* case the Supreme Court of Michigan came to a contrary conclusion under a somewhat similar state of facts. In that case the insured killed himself while insane, and the beneficiary contended that she should have been permitted to go to the jury on the question as to whether the infirmity was due to an injury which the insured had received six weeks before. The court said that under the evidence the accident did not seem to have had anything to do with the insanity, but that even if the accident was the producing cause of the insanity, and by reason of such insanity the insured took his own life, it would not logically follow that the suicide or self-destruction was caused by the injury; that the cause and effect were too remote and unconnected and the question as to whether the injury was the cause of the killing was too conjectural to be submitted to the jury.

In the *Wood* case it appeared that the insured's leg was broken in three places. On the same day the attending surgeon gave him chloroform and set the leg temporarily. Two weeks later the leg was permanently set and chloroform was used as an anaesthetic. About an hour after the second operation the insured raised himself on both elbows and fell back dead. There was very strong and persuasive evidence that the insured had been in perfect health prior to the accident. There was also evidence that the death would not have occurred except for the accident and the Appellate Court concluded that the trial court had properly left the jury to determine whether or not the accident was the sole cause of death.

In the *Gardner* case the policy provided to pay if death should be occasioned from injuries "directly and independently of all other causes." The insured was kicked by a horse. A physician was called and treated the wound and, to insure against tetanus, injected anti-tetanus serum. The in-

sured died a few moments afterwards. The court held that if the administration of the serum was rendered necessary and proper by reason of the accidental injury, and if such injury and the serum alone caused death, then the company was liable, even though the death would not have resulted except for the treatment. This is a border line case, but seems to be in reasonable accord with correct principles.

In the *Collins* case the opinion shows that the insuring clause under consideration was in the usual form. The insured slipped, fell and ruptured himself. The evidence of the defendant established that the insured from birth had a predisposition to rupture because the inguinal canal was not closed as it should have been, but that by virtue of the muscles the opening had been kept shut until the accident. An operation for the cure of the hernia was performed, was apparently successful and the wound started to heal. Several days thereafter the insured died from some obscure poisoning occasioned by unknown changes in bodily function due to etherization. The court held in effect that there was no liability unless the injury was the sole cause of death, but concluded, however, that the evidence justified the theory that the predisposition to hernia had nothing to do with causing insured's death. The court further held that the operation, having been performed as a necessary consequence of the accident, *i. e.*, the ether having been administered as such necessary consequence, the jury was justified in finding that the injury was the cause of the death.

Proposition No. 22.

The rule of proximate and remote causes, as understood in the law of negligence, cannot be applied to the construction of a contractual stipulation contained in a policy of accident insurance to the effect, in substance, that there shall be no liability for death unless caused solely and independently of all other causes, by an injury. In such cases the question at issue is not whether the injury is the proximate cause of death. On the contrary the liability of the company is to be measured by the terms of the insuring clause, and there is no liability unless the injury is the sole cause of death, independent of every other cause, irrespective of whether or not it may, under the law as applied in negligence cases, be considered as the proximate cause.

Com. Trav. Mut. Acc. Assn. v. *Fulton,* 1897, 79 Fed., 423 (see also 2nd appeal, 93 Fed., 621, where the court held that under the evidence the case was for the jury).

Ill. Com. Men's Assn. v. *Parks,* 1910, 179 Fed., 794.

Crandall v. *Continental Casualty Co.,* 1913, 179 Ill. App., 330.

Carr v. *Pac. Mut. Life Ins. Co.,* 1903, 100 Mo. App., 602; 75 S. W., 180.

Penn v. *Standard Life & Acc. Ins. Co.,* 1912, 158 N. C., 29; 73 S. E., 99; on rehearing, 160 N. C., 399; 76 S. E., 262.

Continental Casualty Co. v. *Peltier,* 1905, 104 Va., 222; 51 S. E., 209.

In the *Fulton* case the policy contained what we have heretofore referred to as the redundant clause. It appears from the opinion, on page 430 of the 79th Federal, that the court charged the jury that the plaintiff could recover if the injury was the proximate cause of death. The Court of Appeals said:

> "As was said before, under this policy, and from the facts in proof, there was no question of proximate or remote cause, but only whether there were two co-operating causes, or only a sole cause."

The court also commented upon *Travelers Ins. Co.* v. *Melick,* decided by the U. S. Cir. Ct. of Appeals in 1894, reported 65 Fed., 178, and *Freeman* v. *Merc. Mut. Acc. Assn.,* decided by the Supreme Court of Mass. in 1892, reported 156 Mass., 351; 30 N. E. Rep., 1013, which cases are elsewhere discussed, and pointed out that neither of these cases is authority to sustain the proposition that the company is liable where a pre-existing disease contributes to the death. It also called attention to the fact that in the *Freeman* case the court commented at length upon the question of proximate cause because the policy there construed provided that the insurance should not extend to any case except where the injury should be "the proximate cause of * * * death." The Court of Appeals concluded that it was error for the trial court to read to the jury that portion of the *Freeman* case dealing with the question of proximate cause.

In the *Parks* case the policy under consideration also contained the redundant clause and the court relied largely upon it. Judge Seaman, who rendered the decision, pointed out,

however, on page 798, that there are two divergent lines of decisions in the interpretation of terms employed in such policies for the purpose of limiting the cause of death, saying that these authorities diverged on the inquiry as to whether the general rule of proximate cause is applicable and controlling; that the cases relied upon in support of that contention have seemingly treated and accepted the *Freeman* case, *supra,* as a leading precedent therefor.

Judge Seaman then went on to point out that the policy construed in the *Freeman* case provided to pay where the injury was the proximate cause of death and that, in consequence, the court naturally upheld the familiar doctrine that the law will not go further back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing circumstances and conditions. After referring to the redundant clause Judge Seaman concluded that the ultimate issue of liability under the contract before him was not whether the injury was the proximate cause of death, but whether it was the efficient cause, without the intervention of a pre-existing disease or bodily infirmity as a co-operative cause, and that there would be no liability if any disease or infirmity, existing at the time the injury was received, contributed to bring about death.

It is true that in the *Fulton* and *Parks* cases the policies construed contained the redundant clause and the courts therefore naturally relied upon it. We have previously endeavored to demonstrate that the legal effect of a policy is precisely the same irrespective of whether or not it contains that clause. See Proposition No. 19.

In the *Crandall* case the court had before it a policy which did not contain the redundant clause, but the court, relying upon the *Penn, Carr* and *Fulton* cases, held that the doctrine of proximate cause had no application and that there could be no recovery if a disease or defect, existing prior to the injury, was a contributing factor in bringing about death, without regard to whether or not the injury could, within the doctrine of negligence cases, be considered as the proximate cause of death.

In the *Carr case* the question was not whether a disease was one of the contributing causes of *death,* but whether it was one of the contributing causes of *injury.* In other words, the policy excepted liability for injury, as distinguished from

death, to which a disease should be a contributing factor, directly or indirectly, or which should occur while the insured was affected by disease. The injury was received by reason of the insured jumping from a window while in a delirium brought about by disease. It was contended that the disease was not the proximate cause of the injury, but the court, relying upon the *Fulton* case among others, said on page 182 of the 75th Southwestern:

> "The question presented under the terms of the policy is not whether the plaintiff's sickness was the proximate and immediate cause of his injury, but whether the injury was directly or indirectly caused by his disease."

In the *Penn* case the court had before it a policy which did not contain the redundant clause. On page 100 of the 73rd Southeastern the court referred to that part of the *Carr* case quoted in the preceding paragraph, saying that the provisions excluding disease or bodily infirmity could have no more effect than the general provision "independent of all other causes." On page 101 it pointed out that in some cases where the words proximate cause have been used in the policy to describe the causal connection between the accident and the resultant injury, the courts have held that these words should be construed according to their common meaning as adopted and approved in negligence law, and that as thus interpreted they refer to the efficient cause rather than the sole cause. The court concluded that many of the cases relied upon by the plaintiff could be harmonized with its decision because the policies there construed specifically provided to pay for death which should be caused "proximately" by the injury. In the second decision of the *Penn* case the court again considered the question of proximate cause at some length and concluded on page 264 of the 76th Southeastern, that

> "The rule of proximate and remote causes, as understood in the law of negligence, cannot be justly or safely applied under a contractual stipulation that the injury or death must have 'resulted from the accident, independently of all other causes'."

In the *Peltier* case the Supreme Court of Virginia also had before it a policy which did not contain the redundant clause, and concluded that the trial court had committed reversible error in instructing the jury to the effect that they should

find for the plaintiff unless the injury was not the proximate cause of death.

In this connection, see

French v. Fid. & Cas. Co., 1908, 135 Wis., 259; 115 N. W., 869,

where the Supreme Court of Wisconsin concluded that the term "sole and proximate" is practically synonymous with "independently of all other causes." In that case the court correctly held that where septicaemia, caused solely by an injury, resulted in death, the company was liable. When considered in connection with the facts before the court, this case cannot, we believe, be deemed to enunciate a doctrine contrary to the conclusions above set forth.

In the following cases the policies construed provided, in substance, that the company would be liable if the injury was the proximate cause of death, although in some cases it was further provided that the injury must be the sole cause. As a consequence, because of this unwise selection of terminology by the companies, the courts were obliged to determine the meaning of the word "proximate," and, naturally, fell back upon the doctrine of proximate cause as applied in negligence cases.

McCarthy v. *Travelers Ins. Co.,* 1878, 8 Bissell, 362; Federal case, No. 8682.

Travelers Ins. Co. v. *Murray,* 1891, 16 Colo., 296; 26 Pac., 774.

Freeman v. *Merc. Mut. Acc. Assn.,* 1892, 156 Mass., 351; 30 N. E., 1013.

White v. *Standard Life & Acc. Ins. Co.,* 1905, 95 Minn., 77; 103 N. W., 735-884.

Peck v. *Equitable Acc. Assn.,* 1889, 5 N. Y. Supp., 215.

Ætna Life Ins. Co. v. *Griffin,* 1909, Texas, 123 S. W., 432.

Cary v. *Preferred Acc. Ins. Co.,* 1906, 127 Wis., 67; 106 N. W., 1055.

It is interesting to note that although in all of the above cases the courts were justified in discussing the question of proximate cause because of the use of the word "proximate" in the policies, they do not seem to have laid down any doctrine which is materially inconsistent with correct principles as applied to the construction of policies which do not contain that word. None of them is in conflict with the propo-

sition that there can be no recovery where a disease, defect or bodily infirmity, existing at the time the injury is received, is one of the contributing factors in bringing about death. The courts were necessarily obliged to consider the meaning of the word "proximate," and in connection with such discussion they naturally made statements to the effect that a "proximate cause" means one which directly precedes and produces the effect, as distinguished from a remote cause, and that whether or not a cause is remote or proximate depends not alone upon closeness of time, since, an efficient adequate cause being found, must be deemed the true cause.

These and other similar statements, which were justified because of the terminology of the particular policies which were before the courts, have given rise to much confusion in later cases involving the construction of policies which did not contain the objectionable phraseology. In many such cases, as we have already indicated, the courts seem to have overlooked the distinction between policies providing for liability where the injury is the proximate cause of death, and those which limit liability to cases where the injury is the sole cause of death independent of all other causes.

We shall not take up space by commenting upon all the cases last cited, but shall discuss briefly the *Freeman* and *White* cases.

The *Freeman* case is perhaps the leading one on the question of proximate cause and has been cited by nearly all of the authorities which have gone wrong on this question. In such cases the courts seem to have totally failed to realize that the policy construed in the *Freeman* case specifically provided that it would not cover any case except where the injury should be the proximate cause of death. Because of the language of the policy the court naturally relied upon the doctrine of proximate cause peculiar to negligence law, and said that the proximate cause does not necessarily mean the one nearest in point of time and space; that the law will not go farther back in the line of causation than to find the active, efficient procuring cause of which the event under consideration is a natural and probable consequence.

These and other similar statements of the court in the *Freeman* case have been repeatedly quoted in cases where the policy construed was essentially different in the material respect above referred to. The courts have also frequently overlooked the connection in which the remarks of the court

in the *Freeman* case, relative to proximate cause, were made, namely, in reference to a contention that the company was not liable, even though the injury caused a disease which in turn brought about death. Under the authorities, as we have already shown, there is absolutely no basis for such a position, irrespective of the terms of the insuring clause, and it has been universally held that under such conditions the company is liable. See Proposition No. 20.

The courts in later cases have also frequently overlooked the fact that the court in the *Freeman* case concluded that, even under that policy, there was no liability if a pre-existing disease contributed to bring about death.

In the *White* case, although the policy provided to pay if death resulted from the injury as the proximate cause thereof, the court concluded that the rule of proximate cause, as applied to actions of negligence, could not be applied in its full scope to contracts of that nature. The policy also contained the redundant clause.

The court, relying upon that clause, held that there was no liability where it appeared that the insured was suffering from a disease, at the time he received an injury, which was aggravated by the injury and contributed to bring about death. The court seems to have believed, however, that, except for the presence of the redundant clause, the injury must be regarded as the proximate cause of death. This conclusion is probably correct under the wording of the policy which the Minnesota court had before it. It is manifestly not correct when applied in a case involving the construction of a policy limiting liability to death occasioned by injury solely and independently of all other causes.

In a few cases the policies construed did not provide to pay indemnity if the injury should be the proximate cause of death, but limited liability to cases where the injury should be the sole cause, independent of all other causes, yet the court failing to appreciate this distinction, and being confused by authorities construing policies which contained the objectionable phraseology, attempted to apply the doctrine of proximate cause and, in so doing, made statements which have given rise to much uncertainty and conflict in the law applicable to this class of cases. These authorities furnish very good illustrations of the difficulties arising in an attempt to apply the doctrine of proximate cause in construing

a plain contractual provision, so worded as not to logically permit of the application of that doctrine. See, for example,

Travelers Ins. Co. v. *Melick,* 1894, 65 Fed., 178.
Bohaker v. *Travelers Ins. Co.,* 1913, 215 Mass., 32; 102 N. E., 342.
Continental Casualty Co. v. *Colvin,* 1908, 77 Kan., 561; 95 Pac., 565.
Fid. & Cas. Co. v. *Cooper,* 1910, 137 Ky., 544; 126 S. W., 111.

In all of these cases the courts made misleading statements entirely unjustified under the wording of the contracts construed. Being based upon an erroneous premise, the reasoning whereby the courts endeavored to apply some sort of a hybrid doctrine of proximate cause, is illogical and contradictory.

Notwithstanding this circumstance, the courts in all of these cases appear to have been of the opinion that the company would not be liable if a disease, defect or bodily infirmity, existing at the time the injury was received, was one of the contributing factors in bringing about death.

See, also, in this connection, the following cases, cited and discussed on pages 91 to 99 inclusive, where both the reasoning and conclusion of the courts was erroneous:

Fid. & Cas. Co. v. *Meyer,* Ark., 1912, 152 S. W., 995.
Hall v. *Genl. Acc. Assur. Corp.,* 1915, 16 Ga. App., 66; 85 S. E., 600.
Continental Casualty Co. v. *Lloyd,* 1905, 165 Ind., 52; 73 N. E., 824.
Fetter et al. v. *Fid. & Cas. Co.,* 1903, 174 Mo., 256; 73 S. W., 592.
Driskell v. *U. S. H. & A. Ins. Co.,* 1906, 117 Mo. App., 362; 93 S. W., 880.
Baehr v. *Union Cas. Co. et al.,* 1908, 133 Mo. App., 541; 113 S. W., 689.
Beile v. *Travelers Protective Assn. of Amer.,* 1911, 155 Mo. App., 629; 135 S. W., 497.
Goodes v. *Order United Com. Trav.,* 1913, 174 Mo. App., 330; 156 S. W., 995.

Upon examining these decisions it is apparent that the courts went wrong largely because they erroneously concluded that the doctrine of proximate cause, as applied in neg-

ligence cases, was applicable to the construction of a contract of this character.

Proposition No. 23.

Even though the insured at the time the injury is received is suffering from some disease, defect or bodily infirmity, the company is liable if the injury is sufficient to bring about death entirely independent of, and without any reference to, the disease.

Com. Trav. Mut. Acc. Assn. v. *Fulton,* 1897, 79 Fed., 423; see same case 2nd appeal, 1899, 93 Fed., 621.
Shanberg v. *Fid. & Cas. Co.,* 1905, 158 Fed., 1; affirming 143 Fed., 651.
Ill. Com. Men's Assn. v. *Parks,* 1910, 179 Fed., 794.
Stanton v. *Travelers Ins. Co.,* 1910, 83 Conn., 708; 78 Atl., 317.
Crandall v. *Continental Casualty Co.,* 1913, 179 Ill. App., 330.
Continental Casualty Co. v. *Semple,* Ky., 1908, 112 S. W., 1122.
Travelers Ins. Co. v. *McInerney,* Tex., 1909, 119 S. W., 171.
Ætna Life Ins. Co. v. *Bethel,* 1910, 140 Ky., 609; 131 S. W., 523.
White v. Standard Life & Acc. Ins. Co., 1905, 95 Minn., 77; 103 N. W., 735-884.
Cary v. *Preferred Acc. Ins. Co.,* 1906, 127 Wis., 67; 106 N. W., 1055.

An extreme illustration of this sort of a case is one where the insured, while suffering from disease, is struck by lightning or killed by a bullet from a firearm, accidentally discharged, passing through his heart. In such a case it is manifest that the existing disease has nothing to do with bringing about death, and that hence the company is liable.

The *Semple* case has been sometimes cited as enunciating a doctrine in conflict with correct principles. The real holding of the court was, however, that there being evidence that the injury was sufficient to cause death independent of the pre-existing diseased condition, it was for the jury to determine whether the injury was the sole cause of death. That this is the real holding of the court is pointed out in the recent Kentucky case of *Ætna Life Ins. Co.* v. *Bethel,* 1910, 140 Ky., 609; 131 S. W., 523.

Proposition No. 24.

When it appears that the insured has suffered from some disease and has entirely recovered, but the former disease, although it has entirely disappeared, has left a susceptibility to recurrence, and a fatal recurrence of such disease is brought about solely by an injury effected in a manner covered by the policy, the company is liable.

Miller v. *Fid. & Cas. Co.*, 1899, 97 Fed., 836.
New Amsterdam Cas. Co. v. *Shields*, 1907, 155 Fed., 54.
Freeman v. *Merc. Mut. Acc. Assn.*, 1892, 156 Mass., 351; 30 N. E., 1013.
Ludwig v. *Pref. Acc. Ins. Co.*, 1911, 113 Minn., 510; 130 N. W., 5.
Travelers Ins. Co. v. *Hunter*, 1902, 30 Tex. Civ. Apps., 489; 70 S. W., 798.

See, however, in this connection:

Barry v. *U. S. Mut. Acc. Assn.*, 1885, 23 Fed. Rep., 712; affirmed in *U. S. Mut. Acc. Assn.* v. *Barry*, 1889, 131 U. S., 100,

where the trial court gave an instruction, which was approved by the Supreme Court, to the effect that there could be no recovery if the injury merely brought into activity a then existing but dormant disease, and death resulted wholly or in part from such disease. This decision may be reconciled with those cited to Proposition No. 24 on the theory that there is a distinction between a dormant disease and a mere susceptibility to disease.

Proposition No. 25.

When the insured receives an injury and subsequently contracts a fatal disease, which is not itself brought about by the injury, the company is not liable, even though the disease was contracted by reason of the insured being in a debilitated condition brought about by the injury, whereby his resistive powers were decreased.

Ward v. *Ætna Life Ins. Co.*, 1908, 82 Neb., 499; 118 N. W., 70; 2nd appeal 1909, 85 Neb., 471; 123 N. W., 456.
Continental Casualty Co. v. *Peltier*, 1905, 104 Va., 222; 51 S. E., 209.

See, however, in this connection:

Fid. & Cas. Co. v. *Stacey's Exs.*, 1906, 143 Fed., 271, reversing same case entitled *Carroll* v. *Fid. & Cas. Co.*, 137 Fed., 1012.

Isitt v. *Railway Pass. Assur. Co.*, England, 1889, 22 L. R. Q. B. Div., 504.

In the *Stacey* case the court made an *obiter* statement implying that there would be liability for disability or death occasioned by a cold contracted while in a debilitated condition, brought about by an injury effected in a manner covered by the policy. That proposition was not before the court, and hence the decision cannot be properly considered to support a doctrine contrary to Proposition No. 25.

In the *Isitt* case the English court held that where the insured, because of a debilitated condition brought about by an injury, caught a cold, which in turn produced pneumonia and death, the company was liable. This case can be distinguished, however, because the company did not limit liability to death resulting solely from injury independent of all other causes, but broadly provided for liability if the insured should die from the "effects of . . . injury."

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